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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1616

DR. RONNIE ROGERS, ET AL.,

Petitioners,

vs.

DR. M. L. BROCKETTE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners[1] respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on February 2, 1979.

[1]The Petitioners are Dr. Ronnie Rogers, Harris Hill, Charles Cooper, Darwin Morris, Jim Kennedy, R.E. Dodson, and Dr. Donald Senter, members of the Board of Trustees of the Garland Independent School District, and Dr. Eli Douglas, Superintendent of Schools, Garland Independent School District, individually and in their official

(Footnote continued on following page.)

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 588 F.2d 1057 (5th Cir. 1979), a copy of which is attached hereto in Appendix B along with a copy of the court's judgment.

The United States District Court for the Northern District of Texas did not write an opinion; copies of the order and the judgment of the district court are attached hereto in Appendix C.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on February 2, 1979. This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 21.914 of the Texas Education Code, making the voluntary Federal School Breakfast Program mandatory in Texas schools, conflicts with the federal statute

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capacities, and in behalf of all others similarly situated, and the Garland Independent School District of Texas. The respondents are Dr. M.L. Brockette, the Commissioner of Education for the State of Texas, and the members of the State Board of Education of Texas, Mrs. Elizabeth Armstrong, Vernon Baird, Woodrow W. Bean, James M. Binion, Joe Kelly Butler, W.W. Carter, Don H. Cook, D.D.S., Brian Crouch, Dr. Virginia Currey, Jimmy L. Elrod, W.H. Fetter, Wayne Frederick, Joseph C. Gathe, M.D., E.R. Gregg, Jr., Ruben E. Hinojosa, Jim Hollingsworth, Dr. William N. Kemp, Mrs. Mary Ann Leveridge, Paul Mathews, Dr. Stanley B. McCaleb, Glen L. Smith, Mrs. Yolanda Torres, Mrs. Jane H. Wells, and James H. Whiteside.

creating the School Breakfast Program, 42 U.S.C. §1773, and the implementing regulations, and is therefore in violation of the Supremacy Clause of the United States Constitution.

2. Whether a State Legislature may alter Federal law by a Legislative decision requiring individual schools to participate, or not participate, in the Federal School Breakfast Program when the Federal law authorized each school district to make the decision and thereby encourage a voluntary Program with Federal, State and local cooperation.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provision of the United States Constitution is Article 6, Clause 2, the Supremacy Clause.

The statutes involved are 42 U.S.C. Sections 1773 and 1779, and Sections 21.914 and 23.26 of the Texas Education Code.

The pertinent regulations are 7 C.F.R. Sections 220.2(w) and 220.7(a).

These constitutional provisions, statutes and regulations are set forth in Appendix A.

STATEMENT OF THE CASE

The Garland Independent School District (GISD) and the members of its Board of Trustees and its Superintendent of Schools, in their official capacities and individually as taxpayers in the Garland Independent School District filed this suit in federal district court against the Commissioner of Education and the members of the State Board of Education for declaratory and injunctive relief. The federal district court had jurisdiction of the suit under 28 U.S.C. §§1331 and 1343 in conjunction with 42 U.S.C. §1983. This suit is based upon GISD's contention that a Texas state statute is unconstitutional for being in conflict with the federal breakfast program statute and regulations.

Congress has established several federal statutory programs designed to promote the nutritional health of the country's children from the beginning of life in the mother's womb through the high school years. *Charette v. Bergland*, 457 F.Supp. 1197, 1199 (D.R.I. 1978). Among these programs are the National School Lunch Program and the School Breakfast Program. See 42 U.S.C. §1751 et seq. and §1773. These programs are administered by the Department of Agriculture. 42 U.S.C. §§1779 and 1784. In these two programs the federal government assists participating schools in providing meals to poorer students free or at reduced prices. Participating schools must abide by federal regulations governing the quality and availability of meals and the administration of such programs. In return, a participating school receives a subsidy from the federal government.

These programs as established by Congress and administered by the Department of Agriculture are voluntary. Federal law leaves the decision regarding whether to participate in the School Breakfast Program with the local school authorities.

GISD presently has 45 campuses with food service facilities, with the student population on those campuses ranging from 190 to 2,750 students; it also has three campuses without food service facilities, with student populations ranging from 25 to 90 students. Food is catered to the latter campuses from other campuses. (R. 16-17)

GISD has decided not to participate in either federal program. In lieu thereof, it offers its own locally funded free lunch program for eligible students. (R. 16-17)

Due to the family style of living in GISD, where parents apparently prefer to have their children eat breakfast at home with the family before school instead of sending them to school for breakfast, no parent has ever requested that the district serve breakfast to students. Therefore, GISD has never chosen to operate a breakfast program.

The federal statute provides that states in cooperation with the Department of Agriculture are to carry out an informational program to convince local school districts that they should choose to participate in the School Breakfast Program if they have schools in which the program is needed to provide adequate nutrition for the children in attendance. 42 U.S.C. §1773(g). Rather than taking the time and effort to conduct the informational program and to convince GISD or the more than 800 other school districts in Texas that were not participating in the program that they should elect to participate in the federal-state-local cooperative program, the Texas legislature saved itself the effort and cost of the informational program by enacting in 1977 §21.914 of the Texas Education Code. Section 21.914 provides as follows:

> "If at least 10 percent of the students enrolled in one or more schools in a school district are eligible for free or reduced-price breakfasts under the national school

breakfast program provided for by the Child Nutrition Act of 1966 (42 U.S.C. Subsection 1773), the governing board of the district shall participate in the program and make the benefits of the program available to all eligible students in said schools."

This statute would require GISD to institute the School Breakfast Program in at least twenty-two of its schools. GISD estimates that instituting the program in those schools will require modifying some of the buildings and purchasing of new equipment at a cost of approximately $26,000. It also estimates that instituting the breakfast program will require a lengthened school day which will increase annual salary and utility expenses by $114,000. These expenses may not be covered by federal reimbursements. (R. 16-17, 24-26).

Perceiving that the Texas legislation was a shortcut to allow the state to dodge its informational obligations by altering the nature of the program to one of merely federal-state cooperation by removing from the local officials the choice provided by Congress, GISD initiated this suit alleging that §21.914 of the Texas Education Code conflicts with the federal statutes and regulations. The district court granted a summary judgment for the defendant state officers, holding that none of the plaintiffs had standing to bring the suit, and that the state statute did not conflict with the federal law.

In an expedited review, the Fifth Circuit affirmed the judgment of the district court, holding that GISD did have standing to bring the suit[2] but that §21.914 did not conflict with the federal law.

[2]Due to this ruling, the Fifth Circuit held that it could reach the merits without deciding the standing issue for the taxpayers or the members of the GISD Board of Trustees in their official capacities.

REASONS FOR GRANTING THE WRIT

The Court should grant a review on writ of certiorari of the judgment of the United States Court of Appeals for the Fifth Circuit because portions of the decision of that court decide important questions of federal law which have not been, but should be, settled by the Supreme Court. The Fifth Circuit's decision will have a significant impact upon and could hinder the administration of the School Breakfast Program both in Texas and nationwide. Furthermore, portions of the Fifth Circuit's decision conflict, in principle, with decisions of this court and decisions of other courts.

1.

The Decision Below Has a Major Impact on the Fundamental Federal-State-Local Relationship Established by Congress in the School Breakfast Program.

The Fifth Circuit's opinion in this case involves important statutory and policy considerations which are fundamental to many federal statutory welfare programs in general and the School Breakfast Program in particular. Since this Court has never had occasion to address itself to the federal food programs, there are compelling reasons for the Court to set guidelines on the federal-state-local relationship involved in the School Breakfast Program and the extent to which a state may permissibly alter this relationship.

The School Breakfast Program is one of a number of federal statutory programs designed to promote the nutritional health of American children from the beginning of life in the mother's womb through the high school years. The program was initially authorized as a 2-year pilot program under the Child Nutrition Act of 1966. Participating schools were selected by state educational agencies from those schools drawing attendance from areas in which poor economic conditions existed and from

those schools where a substantial proportion of the children enrolled must travel long distances daily. Since its inception, the program has been continued and expanded by frequent amendment. In 1972, the School Breakfast Program was made available to all schools that desired the program, and the program funding was made open-ended. In October, 1975, Congress made the program permanent. The federal food programs, such as the National School Lunch Program, the School Breakfast Program and the special milk programs, have been designed by Congress to be voluntary federal-state-local cooperative programs. Each level has its own authority and responsibilities in the administration of the program. As conceived by Congress, the local level, the school district governing body or "School Food Authority," 7 C.F.R. §220.2(w), determines which of its schools will participate and administers the program in its participating schools. The state educational agency is primarily the conduit for the distribution of federal funds to the local level and is responsible for monitoring compliance with the program by the participating local authorities. The Secretary of Agriculture is charged by Congress with prescribing "such regulations as he may deem necessary," 42 U.S.C. §1779, with administering the program on a national basis, and with seeking and distributing the federal funds necessary for the program.

As with any voluntary program, someone or some entity has the authority to decide whether to participate. For the School Breakfast Program, Congress has given this authority to the school district governing board.

> "There is hereby authorized to be appropriated such sums as are necessary to enable the Secretary . . . to initiate, maintain, or expand nonprofit breakfast programs in *all schools which make application for assistance* and agree to carry out a nonprofit breakfast program . . . ." 42 U.S.C. §1773(a) (emphasis added).

The implementing regulations promulgated by the Secretary of Agriculture repeat this grant of the authority to make the "participation decision."

> "The *School Food Authority* shall make written application to the State agency . . . for *any school* in which *it* desires to operate the School Breakfast Program . . . ." 7 C.F.R. §220.7(a) (emphasis added).

The State of Texas now seeks to alter the relationship established by federal law by taking from the local authorities and appropriating to itself the right to decide which of the schools in the state will participate in the School Breakfast Program. Tex.Educ.Code, §21.914. The decision of the Fifth Circuit approves the state's alteration of this fundamental basis of the School Breakfast Program.

The Fifth Circuit attempts to justify its approval of the Texas statute by interpreting §1773(a) to be merely an authorization of funds, not dealing with the relative powers of states and local school boards. That interpretation fails in light of the present nature of the program and the specific language of the statute. In amending the statute in 1972, Congress not only removed the appropriations ceiling but also changed the scope of the program. Congress expanded the program from one limited to certain schools to ". . . all schools which make application for assistance. . . ." If Congress had intended for the states to have the choice of which schools were to participate or not participate in the School Breakfast Program, it would have amended §1773(a) to read "in all schools which the states select."

The legislative history further shows that Congress intended for the local school authorities to make the decision of whether to participate in the program. For example, in debate in the passage of the 1972 amendment, Representative Perkins, the chairman of the House committee recommending the amendment, stated that

the amendment would require the federal agency and the states to provide the breakfast program to every school that applies. 118 Cong. Rec. 23415 (1972). Representative Mink explained that the amendment was intended to expand "the school breakfast program to *every school* in the nation that *desires* to participate. . . ." *Id.* at 23419 (emphasis added).

Similarly, in the Senate, Senators McGovern, Hart and Humphrey stated that the amendment made the program available to all schools "desiring" or requesting the federal breakfast program. *Id.* at 28564, 28565, 28569. This intent was also expressed by Senator Case in the committee hearings considering the status of the breakfast program. *Hearing on Nutrition and Human Needs, 1972 Part 1: School Breakfast Program Survey, before Senate Select Comm. on Nutrition and Human Needs,* 92d Cong., 2d Sess., at 4-6 (1972).

Congress gave the right to make the decision on the implementation of the program to the local authorities because Congress recognized the critical importance of local support in implementing any food program. Indeed, Congress has often expressed its view that the success of the various school food programs is attributable to leaving as many decisions as possible to the local school boards and officials. See 112 Cong. Rec. 15283, 15286 (1966) (remarks of Senator Tower); 118 Cong. Rec. 28595 (1972) (remarks of Senator Allen); 119 Cong. Rec. 31077 (1973) (remarks of Senator Allen). In congressional hearings, the Department of Agriculture has pointed out the critical role of the local level. In the 1972 hearings, Assistant Secretary Richard Lyng testified, "*We need to recognize, of course, that in the final analysis, it is local interest, local effort, and local funds that are ultimate keys to the success or failure of any federally-assisted activity.*" *Hearing on Nutrition and Human Needs, 1972 Part 1: School Breakfast Program Survey, before Senate Select Comm. on Nutrition and Human Needs,* 92d Cong., 2d Sess., at 44 (1972) (emphasis added).

The Fifth Circuit minimized the statutory language, mentioning that §1773(a) says "schools" not "school boards." The legislative history of this section shows that the language is consistent with the Petitioners' interpretation. During consideration of school lunch and child nutrition amendments in 1970, Senator McGovern urged substituting "local educational agency" meaning school district for "school" in a number of places in the School Lunch and Child Nutrition Acts. The Senate Committee report recommended against this substitution, explaining that with respect to the contracting function of the program, the Agriculture Department already interpreted "school" to mean the school district in considering the contracting agency and that with respect to the local administration of the program, the local school districts should be permitted to decide whether to handle administrative functions on a district-wide basis or on a school-by-school basis. S.Rep.No. 91-641, 91st Cong., 2d Sess., 3-4 (1970). Thus, the use of the term "school" in this act was clearly intended by Congress to insure that the local school district governing body had adequate administrative flexibility in regard to the food programs.

"A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186 (1969). While amending the Child Nutrition Act in the years since 1972, committee reports have often expressed the intent of Congress to maintain the decision of the implementation of the School Breakfast Program at the local level. For example, in passage of the 1975 amendments, the Senate committee described the administration of the Child Nutrition programs, including the School Breakfast Program, as follows:

> "The Food and Nutrition Service of the Department of Agriculture is responsible for the national administration of the programs. The programs are normally administered in

cooperation with State Departments of Education. Due to restrictions in State law and to other factors, USDA directly administers the programs in private schools in several States. *Participation at the local level is voluntary.*" S.Rep.No. 94-259, 94th Cong., 1st Sess., at 9 (1975) (emphasis added).

The intent of Congress was reemphasized in the recent consideration and debate in passing the 1978 amendments to the School Breakfast Program. During that consideration the House committee recommended a bill that would have converted the School Breakfast Program to a mandatory program under specified conditions. This recommendation of the House committee was strongly opposed by a minority report stating, "We support a breakfast program voluntarily adopted by the schools, and support the incentives in this bill for an expansion of school breakfasts, but oppose making them compulsory." H.R. Rep.No. 95-1153, 95th Cong., 2d Sess., at 63 (1978). The Senate committee deleted a similar proposal in the Senate bill, stating, "*It is the belief of the committee that the decision to conduct a school breakfast program should be made by the local authorities who are familiar with community needs.*" S.Rep.No. 95-884, 95th Cong., 2d Sess., 23 (1978) (emphasis added). The Senate committee also explicitly expressed the approach to be used to expand the School Breakfast Program. "*While leaving the decision on implementation of the program to the local authorities*, these new financial incentives will make the program more attractive." *Id.* at 20 (emphasis added).

The Senate bill maintaining the original relationship with local authorities was passed as the 1978 amendment to the program. On both occasions when the bill was considered by the Senate, Senator Talmadge addressed this subject. On the first occasion, he stated that the Senate committee believed "that the decision to conduct a school breakfast program should be made by the

local authorities who are familiar with the needs of our children." 124 Cong. Rec. S11483 (daily ed. July 21, 1978).

After the House passed the Senate bill with amendments, Senator Talmadge spoke again on this matter in support of the bill as amended.

> "I am pleased that the House deleted the provision in their bill that would have mandated a gradual phase-in of the school breakfast program in certain public schools serving poor populations. . . . This is a delicate question of balancing the interests of local school authorities against the desires of forces from outside the community. I believe that the decision regarding whether to initiate a breakfast program should remain with the local school authorities and that is where S. 3085 leaves it." 124 Cong. Rec. S19217 (daily ed. October 14, 1978).

In addition, the Fifth Circuit did not give adequate consideration to the specific language of the federal regulations that a School Food Authority will apply "for any school in which *it desires* to operate the School Breakfast Program." 7 C.F.R. §220.7(a) (emphasis added). The Fifth Circuit simply ignores this language and distracts the reader's attention by suggesting, without deciding, that the regulation is merely a traffic control device. The court attempts to justify ignoring this regulation on the basis that state law defines the legal authority of local bodies and that by enacting §21.914, Texas removed from GISD the legal authority to decide to participate in the program. This rationale merely states what Texas did. It does not explain the legal basis for a state's altering a federal program. Significantly, §21.914 does not reorganize school authorities in Texas so that GISD would no longer be a School Food Authority. Instead, Texas attempts to withdraw from the School Food Authority that authority granted by federal law to decide whether to initiate the School Breakfast Program.

The right of the local authority to make this decision is fundamental to the present structure of the School Breakfast Program. A state's shifting of this decision to the state level creates a fundamental change in the federal-state-local relationship of this federal program, justifying the grant of certiorari to review the judgment below.

2.

The Decision Below Will Have Significant Impact Upon and Could Result in a Serious Hindrance in the Operation of the School Breakfast Program.

In fiscal year 1967 when the School Breakfast Program was initiated, 49 schools participated in the program, and the federal obligations amounted to $573,000. Within ten years, 22,894 schools were participating in the program. In fiscal year 1977, the number of participating children increased to over 2.56 million in the peak month, and a total of 421 million breakfasts were served, an increase of 20 percent over fiscal year 1976. Over 85 percent of the breakfasts were served free or at a reduced price to needy children. The federal obligation had expanded to $144,076,000, 250 times the federal obligation for fiscal year 1967. See S.Rep.No. 95-884, 95th Cong., 2d Sess., 14, 19-20 (1978).

There are approximately 1,100 school districts in Texas operating over 5,000 elementary and secondary schools. National Center for Educational Statistics, *Digest of Educational Statistics 1977-1978*, 12 Table 9; Dallas Morning News, *Texas Almanac, 1976-1977*, 523. In 1977, the School Breakfast Program was operated in 1,241 Texas schools. Department of Agriculture, *Food and Nutrition Service, School Breakfast Program FY 1977, Texas* (computer print-out). As of May, 1976, only California and Puerto Rico had more schools

participating in the program than Texas and only California had more children participating. Department of Agriculture, *Food and Nutrition Service, Breakfast Program, May 1976* (computer print-out).

The authority to make the decision of whether to participate in the School Breakfast Program is an important right. That decision involves more than just a consideration of whether or not to feed children. It involves important considerations of cost, practicability and local demand or lack thereof. The ability to implement the program is dependent upon the availability of the necessary facilities. Additional facilities may be required in order to start the program. A breakfast program may necessitate a rescheduling of the district's entire busing schedule. This could mean that children who ride the school bus might have to rise earlier and leave for school earlier in the morning. In winter months, an earlier morning bus schedule might mean more hazardous road conditions during days of inclement weather. Alternatively, the rescheduling of classes and extension of the school day in the afternoon could cause a significant disruption of extracurricular and athletic programs. Even if these programs can be salvaged, the change in the bus schedule would lengthen the school day for all students who ride the bus even if they do not wish to eat breakfast at school. Moreover, the implementation of the program could cause increased costs in supervision and building operational costs that might not be offset by federal funds. See *Hearings on S. 2630, S. 2809 & S. 2824 before the Subcomm. on Nutrition of the Senate Comm. on Agriculture, Nutrition and Forestry*, 95th Cong., 2d Sess., pt. II, at 99, 134 (1978). That is the reason Congress placed the right to make the decision regarding whether to implement the School Breakfast Program with the local school authorities.

The Texas statute under the circumstances it specifies removes the right to make that decision from the 1,100 local school

district governing bodies. Moreover, the particular circumstances specified in the statute are not necessarily significant. If Texas has the right to make this decision as the Fifth Circuit has held, then it has the power to exercise that decision in all cases.

Obviously, if Texas can remove this power from its local school districts, so can every other state. If the other states follow the lead of Texas, the over 20,000 local educational agencies could lose the choice Congress gave to them. See S.Rep. No. 91-641, 91st Cong., 2d Sess., 3 (1970). Such a change would be a major shift in the administration and the philosophical intent of the School Breakfast Program.

Moreover, the Fifth Circuit's approval of Texas' appropriation to the state-level of the decision-making power in the School Breakfast Program could result in a serious hindrance in the administration of the program. Allowed to make these decisions at the state level, a state could as easily destroy the entire School Breakfast Program as Texas altered the cooperative federal-state-local foundation of the program. The deleterious impact of the decision below is obscured in the present exercise of the decision-making power by Texas because the legislature decided this time to expand the number of schools in Texas participating in the program.[3] However, if the states are

[3]The Fifth Circuit thought that the Texas Legislature's mandate of the School Breakfast Program would help to expand and strengthen the program. However, persons actively involved in the area are not in agreement with that evaluation. In regard to the proposed mandate provision in the 1978 amendments bill, Ms. Josephine Martin, Past President, American School Food Service Association and State Director, Georgia Food Service Association, Atlanta, Georgia, testified:

> "We believe that such an action might very well signal the collapse of State, Federal, and local cooperation in these programs and might usher in a decade of decline in popular support of school nutrition programs.

(Footnote continued on following page.)

allowed to shift the decision authority from the local level to the state level, the states will be able to decide not only what schools will participate, but also what schools will not participate, for the decision involves both choices. Thus, for example, in the future, Texas might exercise the power by deciding a school district will not apply for the school breakfast program for any school in which less than fifty percent of the students qualify for free or reduced-price breakfasts, or it might decide that no school district in Texas shall apply for the School Breakfast Program. This example shows that allowing the states to take the initiating decision away from the local level is antagonistic to the intent of Congress to make the breakfast program available to all schools that desire it. Of course, if the Texas legislature can pass a statute requiring or prohibiting entry of local schools into the School Breakfast Program, so could the other 49 state legislatures.[4]

> "Mandates in the breakfast program have already been enacted in Michigan and Ohio. In both cases I am told they have been unsuccessful and have produced serious backlashes against school nutrition programs. In both cases they have caused serious changes in attitude regarding our programs and have brought them to be seen as Federal welfare programs and not educational programs, and in both States they resulted in very little growth in breakfast feeding . . .
>
> "Members of the Columbus, Ohio, School Board can recount to you the crippling effects of a mandate upon the operation of a local school system. I think you will be disheartened to hear from them the kind of ideological and political issues which a school breakfast mandate injected into the operation of this community school system."

Hearings on S. 2630, S. 2809, and S. 2824 Before the Subcomm. on Nutrition of the Senate Comm. on Agriculture, Nutrition and Forestry, 95th Cong., 2d Sess., pt. 1, at 254 (1978).

[4]The Fifth Circuit attempts to duck this mammoth problem of allowing the implementing decision to be made at the state level by saying in a footnote, "It follows, of course, that our decision does not suggest that a state could constitutionally require a school or school

(Footnote continued on following page.)

Therefore, it can be seen that a fundamental concern in the operation of the School Breakfast Program is the determination of where the power to decide to implement such a program lies. The action of a state to seize the authority to make this decision from the local school authorities heralds a substantial change in the federal-state-local relationship established by federal law. Moreover, the decision below has profound implications beyond the School Breakfast Program, for it authorizes a state to control or at least modify any federal program without the authorization of Congress.

The implications of Texas' unilateral fundamental alteration in the federal-state-local cooperative relationship which forms the basis of the School Breakfast Program and the potential hindrance it can pose for the expansion of the program require this Court's review before other states follow Texas' lead.

There are or were at least four other states that have mandated specified schools to provide a breakfast program; however, it does not appear that those states — Massachusetts, Michigan, New York and Ohio — have taken the same approach as Texas. It appears from the text of the statutes of Massachusetts (Mass. Ann. Laws ch. 15, §1G (1973)), Michigan (Mich. Comp. Laws Ann §380.1272a(2) (Supp. 1978), and New York (N.Y. Educ. §2554 note (McKinney Supp. 1977-1978)), that the schools are not required to participate in the federal School Breakfast Program, although certain schools are required under stated conditions to establish a breakfast program for their students. In these states, a school apparently could comply with the state law

board to *reject* the breakfast program." 588 F.2d at 1972 n.26 (court's emphasis). The Fifth Circuit gives no explanation of this rather remarkable statement. Whoever has the choice can decide to participate or not to participate in the program. The conflict with the intent of the federal law presented by the state deciding which schools will participate in the program will not go away simply because the Fifth Circuit wishes it would.

by establishing a local breakfast program, similar to GISD's local lunch program, and not participate in the federal program. Therefore, local authorities would still be able to make the choice regarding participation in the federal School Breakfast Program, although they have additional incentives to join. Although the Ohio statute (Ohio Rev. Code §3313.813 (Supp. 1977)) requires affected boards of education to establish breakfast programs, it is not clear from the text whether an affected local board of education has lost its right to make the decision regarding participation in the federal School Breakfast Program. Petitioners are unaware of any reported cases interpreting these statutes to alter the federal law as the Texas statute does.

There is a significant legal difference in these two approaches. Although a mandated state breakfast program may give a local school district additional incentive for participating in the School Breakfast Program, it does not alter the frame-work of the federal program. However, there can also be a significant practical difference. When a state mandates a state program, it will very likely help to fund the program. See N. Y. Educ. §2554 note, §3 (McKinney Supp. 1977-1978). However, when Texas simply pre-empted the decision regarding participation in the federal program, it saw no need to provide any state funds. Thus, there may be a financial incentive to states considering mandating schools to offer a breakfast program to follow Texas' lead of simply pre-empting the decision to participate in the federal program instead of creating and funding a state program.[5]

As previously noted, once a state pre-empts the decision-making power, it can decide which schools will not participate in

[5] The Food Research and Action Center (FRAC) filed an amicus curiae brief in the Fifth Circuit. In its brief FRAC stated that bills establishing state breakfast mandates would be introduced in Florida, Louisiana, and Maryland.

the federal program as well as which schools will be required to participate. Moreover, even if the states always exercised the choice to expand the program, the mandating approach could seriously set the program back. As shown by congressional testimony, mandating a breakfast program can change the public perception of the program and undermine the local support that can be obtained by the federally required informational efforts. See note 3, *supra*. If local support is undermined, schools could very well stop participating if the mandates are terminated either by the state revoking them[6] or by the courts subsequently determining that state mandates like that of Texas conflict with the federal law. Once local support has been undermined, it is likely that it would be more difficult to get schools to participate than if states had emphasized the educational effort in cooperation with the Department of Agriculture as required by the federal statute.

The expanding interest shown in state mandated breakfast programs in schools makes it all the more urgent that this Court decide this important issue before other states follow the lead of Texas.

3.

The Decision Below Conflicts with Principles in Decisions of This Court and Other Courts.

The analysis used by the Fifth Circuit to review the validity of the Texas statute conflicts with principles set forth in prior opinions by this Court and other courts. The Fifth Circuit based

[6] In its amicus brief FRAC reported that Massachusetts has repealed its mandated program in its state Budget for 1979. In a footnote in *Charette v. Bergland, supra*, 457 F.Supp. at 1207, n.14, the court states that South Carolina repealed a statute mandating breakfast programs in every school and the result was a decrease in participation.

its affirmance of the Texas statute upon its evaluation that the federal legislation does not indicate a distrust of state governments and that the Texas statute does not clash with the intent of Congress to expand the School Breakfast Program. This analysis might be satisfactory if this case involved a standard pre-emption question where the state was implementing its own separate program. However, in this case Texas is attempting to regulate a federal statutory program.

This Court has repeatedly held that when the federal government establishes a federal program to promote the general welfare, the federal government's terms and conditions for the disbursement of federal money control, and that inconsistent state laws are invalid. *King v. Smith*, 392 U.S. 309, 333 n. 34 (1968); *Helvering v. Davis*, 301 U.S. 619, 645 (1937).

The Court's decisions in the several A.F.D.C. program cases show that when a state participates in a voluntary federal program, even in those instances where the state is given a great deal of discretion, it must follow the federal provisions unless authorized otherwise by the federal statute. See *King v. Smith, supra, Townsend v. Swank*, 404 U.S. 282 (1971); *Miller v. Youakim*, 99 S.Ct. 957 (1979).

When a state participates in a federal program, its authority within the federal program, as opposed to a concurrent program of its own, comes from the federal law. In the instant case, the Fifth Circuit fails to cite any provision of §1773 which gives the states the right to ignore and abandon their requirement to provide an informational program about the benefits of the School Breakfast Program to the local school districts and to substitute a state mandate to the local school districts in lieu of the choice granted the local districts by the federal statute. This failure is not due to a mere oversight; instead, it is due to the absence of any such provision.

In a case involving a different federal program, the District of Columbia Circuit has applied the principle that if the federal law indicates which entity is to make decisions in a voluntary federal program, a state desiring to participate in the program must allow the entity to make those decisions. See *County of Los Angeles, Cal. v. Adams*, 574 F.2d 607 (D.C. Cir. 1978). In *Adams*, the D.C. Circuit correctly held that the participating states could designate the composition of the metropolitan planning organization, but once that was done, the federal law gave the metropolitan planning organization the power to select the highway projects for which federal funds would be sought. The state was bound by federal law if it wished to participate in the program.

In contrast, in the instant case, the Fifth Circuit has approved Texas' alteration of the federal law (1) by changing the decision-making body from the one designated by the federal law, the school district governing body, to one designated by the state, and (2) by scrapping the Federal requirement of educating the local districts about the merits of the Program. The Fifth Circuit thereby condones the Texas Legislature's decision to remove the local element of the federal-state-local cooperation from the equation by deleting both the local choice and the educational program in one shot.

Moreover, the School Breakfast Program is available to private as well as public schools.[7] Significantly, the Texas Legislature did not attempt to require private schools to participate in the School Breakfast Program if they met the circumstance stated in §21.914. Indeed, the state has never even contended that it has the right under the School Breakfast Program to direct private schools to participate in the program. Obviously, it is the local authorities of the private school who

[7] 42 U.S.C. §1784(c) defines "school" as "any public or nonprofit private school of high school grade or under. . . ."

decide whether it will participate and not the state. But the federal law does not distinguish between public and private schools. When a bill proposing a mandated school breakfast program was recommended by the House Committee on Education and Labor, the minority view pointed out that by the exemption of private schools from the proposed mandate, Congress would be "for the first time treating public and private schools differently in this legislation." H.R.No. 95-1153, pt. 1, 95th Cong., 2d Sess., at 63 (1978) (minority views). Since a mandate was subsequently deleted from the Child Nutrition Amendments of 1978, Congress did not begin to treat public and private schools differently. Thus, there is no authority in the federal statute authorizing the states to treat the public and private schools differently by removing the right to decide whether to participate from the local authorities of the public schools.

The conflict in the approaches of these cases casts doubt upon the requirement of a state participating in a federal program to comply with the federal concept of the program if it has an inherent power to modify those portions of the federal program with which it disagrees.

Although considering different aspects of the School Breakfast Program, district courts in two other circuits have held that Congress intended the School Breakfast Program to be voluntary. *Charette v. Bergland*, 457 F.Supp. 1197 (D.R.I. 1978); *Torres v. Butz*, 397 F.Supp. 1015 (N.D. Ill. 1975). Indeed, the *Torres* court held that the local board of education was the entity to make the decision to participate.

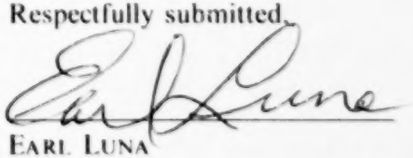
The *Torres* case is not identical to the instant one because that court was considering whether the decision could be made by the individual school principals on a school-by-school basis. This poses another conflict with the Fifth Circuit's decision approving the Texas statute. The Texas statute provides that school districts

must apply for the school breakfast program only for those schools which meet the statutory criteria. However, the *Torres* court held that a school district board that elects to participate in the breakfast program, must make that program available to all the children in the district that qualify for a free or reduced-price breakfast. The resolution of this conflict is extremely important in the administration of the breakfast program because it governs whether the governmental body deciding whether to participate in a school breakfast program can make that decision on a school-by school basis (thus taking into account the number of students qualifying for free or reduced-price breakfasts, transportation difficulties, and the facilities or the lack thereof), or whether it is limited to an all-or-nothing choice for the entire district. The scope of the choice available may well influence the decision of whether or not to participate in the program.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States, that I am one of the attorneys of record for Petitioners herein, and that on this the 10th day of August, 1979, three copies of the Petition for Writ of Certiorari were mailed, first class postage prepaid, to the Honorable Mark White, Attorney General of Texas, ATTENTION: Nathan Johnson, Assistant Attorney General, Supreme Court Building, P.O. Box 12548, Austin, Texas, 78711, Counsel for the Respondents. I further certify that all parties required to be served have been served.

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APPENDIX

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTION OF THE UNITED STATES

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL STATUTES

42 U.S.C. §1773

School Breakfast Program

Establishment; authorization of appropriations

(a) There is hereby authorized to be appropriated such sums as are necessary to enable the Secretary to carry out a program to assist the States through grants-in-aid and other means to initiate, maintain, or expand nonprofit breakfast programs in all schools which make application for assistance and agree to carry out a nonprofit breakfast program in accordance with this chapter. Appropriations and expenditures for this chapter shall be considered Health, Education, and Welfare functions for budget purposes rather than functions of Agriculture.

Apportionment of funds to States; national average payment for breakfasts, reduced price breakfasts, and free breakfasts; additional payments, severe need: maximum payment for free and reduced price breakfasts

(b)(1) Of the funds appropriated for the purposes of this section, the Secretary shall for the fiscal year ending June 30, 1973, (1) apportion $2,600,000 equally among the States other than Guam, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands, and $45,000 equally among Guam, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands, and (2) apportion the remainder among the States in accordance with the apportionment formula contained in section 1753 of this title. For each fiscal year beginning with the fiscal year ending June 30, 1974, the Secretary shall make breakfast assistance payments, at such times as he may determine, from the sums appropriated therefor, to each State educational agency, in a total amount equal to the result obtained by (1) multiplying the number of breakfasts (consisting of a combination of foods which meet the minimum nutritional requirements prescribed by the Secretary pursuant to subsection (e) of the this section) served during such fiscal year to children in schools in such States which participate in the breakfast program under this section under agreements with such State educational agency by a national average breakfast payment prescribed by the Secretary for such fiscal year to carry out the purposes of this section; (2) multiplying the number of such breakfasts served free to children eligible for free breakfasts in such schools during such fiscal year by a national average free breakfast payment prescribed by the Secretary for such fiscal year to carry out the purposes of this section; and (3) multiplying the number of reduced price breakfasts served to children eligible for reduced price breakfasts in such schools during such fiscal year by a national average reduced price breakfast payment prescribed by the Secretary for such fiscal year to carry out the

provisions of this section: *Provided*, That in any fiscal year the aggregate amount of the breakfast assistance payments made by the Secretary to each State educational agency for any fiscal year shall not be less than the amount of the payments made by the State educational agency to participating schools within the State for the fiscal year ending June 30, 1972, to carry out the purposes of this section.

(2)(A) The Secretary shall make additional payments for breakfasts served to children qualifying for a free or reduced-price meal at schools that are in severe need.

(B) The maximum payment for each such free breakfast shall be the higher of —

(i) the national average payment established by the Secretary for free breakfasts plus 10 cents, or

(ii) 45 cents, which shall be adjusted on a semiannual basis each July 1 and January 1 to the nearest one-fourth cent in accordance with changes in the series for food away from home of the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor for the most recent six-month period for which such data are available, except that the initial such adjustment shall be made on January 1, 1978, and shall reflect the change in the series of food away from home during the period November 1, 1976, to October 31, 1977.

(C) The maximum payment for each such reduced-price breakfast shall be five cents less than the maximum payment for each free breakfast as determined under clause (B) of this paragraph.

Disbursement of apportioned funds by State; preference for schools in poor economic areas, for students traveling long distances daily, and for schools for improvement of nutrition and dietary practices of children of working mothers and from low-income families

(c) Funds apportioned and paid to any State for the purpose of this section shall be disbursed by the State educational agency to schools selected by the State educational agency to assist such schools in financing the costs of operating a breakfast program and for the purpose of subsection (d) of this section. Disbursement to schools shall be made at such rates per meal or on such other basis as the Secretary shall prescribe. In selecting schools for participation, the State educational agency shall, to the extent practicable, give first consideration to those schools drawing attendance from areas in which poor economic conditions exist, to those schools in which a substantial proportion of the children enrolled must travel long distances daily, and to those schools in which there is a special need for improving the nutrition and dietary practices of children of working mothers and children from low-income families. Breakfast assistance disbursements to schools under this section may be made in advance or by way of reimbursement in accordance with procedures prescribed by the Secretary.

Severe need assistance; eligibility standards; receipt of lesser of operating costs of breakfast program or meal reimbursement rate

(d) Each State educational agency shall establish eligibility standards for providing additional assistance to schools in severe need, which shall include those schools in which the service of breakfasts is required pursuant to State law and those schools (having a breakfast program or desiring to initiate a breakfast program) in which, during the most recent second preceding

school year for which lunches were served, 40 percent or more of the lunches served to students at the school were served free or at a reduced price and in which the rate per meal established by the Secretary is insufficient to cover the costs of the breakfast program. Such eligibility standards shall be submitted to the Secretary for approval and included in the State plan of child nutrition operations required by section 1759a(e)(1) of this title. Pursuant to those State eligibility standards, a school, upon the submission of appropriate documentation about the need circumstances in that school and the school's eligibility for additional assistance, shall be entitled to receive 100 percent of the operating costs of the breakfast program, including the costs of obtaining, preparing, and serving food, or the meal reimbursement rate specified in paragraph (2) of subsection (b) of this section, whichever is less.

Nutritional requirements; service free or at reduced price

(e) Breakfasts served by schools participating in the school breakfast program under this section shall consist of a combination of foods and shall meet minimum nutritional requirements prescribed by the Secretary on the basis of tested nutritional research. Such breakfasts shall be served free or at a reduced price to children in school under the same terms and conditions as are set forth with respect to the service of lunches free or at a reduced price in section 1758 of this title.

Nonprofit private schools

(f) For the fiscal year ending June 30, 1973, any withholding of funds for and disbursement to nonprofit private schools shall be effected in the manner used prior to such fiscal year. Beginning with the fiscal year ending June 30, 1974, the Secretary shall make payments from the sums appropriated for any fiscal year for the purposes of this section directly to the

schools (as defined in section 1784(c) of this title which are private and nonprofit as defined in the last sentence of section 1784(c) of this title) within a State, that participate in the breakfast program under an agreement with the Secretary, for the same purposes and subject to the same conditions as are authorized or required under this section with respect to the disbursements by State educational agencies.

Expansion of program

(g) As a national nutrition and health policy, it is the purpose and intent of the Congress that the school breakfast program be made available in all schools where it is needed to provide adequate nutrition for children in attendance. The Secretary is hereby directed, in cooperation with State educational agencies, to carry out a program of information in furtherance of this policy. Within 4 months after October 7, 1975, the Secretary shall report to the committees of jurisdiction in the Congress his plans and those of the cooperating State agencies to bring about the needed expansion in the school breakfast program.

42 U.S.C. §1779

Rules and regulations; transfer of funds from one program to another; special projects

The Secretary shall prescribe such regulations as he may deem necessary to carry out this chapter and the National School Lunch Act, including regulations relating to the service of food in participating schools and service institutions in competition with the programs authorized under this chapter and the National School Lunch Act. Such regulations shall not prohibit the sale of competitive foods approved by the Secretary in food service facilities or areas during the time of service of food under this chapter or the National School Lunch Act if the proceeds from

the sales of such foods will inure to the benefit of the schools or of organizations of students approved by the schools. In such regulations the Secretary may provide for the transfer of funds by any State between the programs authorized under this chapter and the National School Lunch Act on the basis of an approved State plan of operation for the use of the funds and may provide for the reserve of up to 1 per centum of the funds available for apportionment to any State to carry out special developmental projects.

FEDERAL REGULATIONS

7 C.F.R. Part 220

School Breakfast Program

§220.2

Definitions.

For the purposes of this part the term:

(w) "School Food Authority" means the governing body which is responsible for the administration of one or more schools and which has legal authority to operate a breakfast program therein.

§220.7

Requirements for participation

(a) The School Food Authority shall make written application to the State agency, or FNSRO where applicable, for any school in which it desires to operate the School Breakfast Program, if such school did not participate in the Program in the

prior fiscal year. The School Food Authority shall also submit for approval, either with the application or at the request of the State agency, or FNSRO where applicable, a free and reduced price policy statement in accordance with Part 245 of this chapter. A School Food Authority which simultaneously makes application for the National School Lunch Program and the School Breakfast Program shall submit one free and reduced price policy statement which shall provide that the terms, conditions, and eligibility criteria set forth in such policy statement shall apply to the service of free and reduced price lunches and to the service of free and reduced price breakfasts. If, at the time application is made for the School Breakfast Program, a School Food Authority has an approved free and reduced price policy statement on file with the State agency, or FNSRO where applicable, for the National School Lunch Program, it need only confirm in writing that such approved policy statement will also apply to the operation of its School Breakfast Program. Applications for the School Breakfast Program shall not be approved in the absence of an approved free and reduced price policy statement.

TEXAS STATUTES

Texas Education Code

§21.914

If at least 10 percent of the students enrolled in one or more schools in a school district are eligible for free or reduced-price breakfasts under the national school breakfast program provided for by the Child Nutrition Act of 1966 (42 U.S.C. Subsection 1773), the governing board of the district shall participate in the program and make the benefits of the program available to all eligible students in said schools.

§23.26

(a) The trustees shall constitute a body corporate and in the name of the school district may acquire and hold real and personal property, sue and be sued, and receive bequests and donations or other moneys or funds coming legally into their hands.

(b) The trustees shall have the exclusive power to manage and govern the public free schools of the district.

(c) All rights and titles to the school property of the district, whether real or personal, shall be vested in the trustees and their successors in office.

(d) The trustees may adopt such rules, regulations, and by-laws as they may deem proper.

APPENDIX B

DR. RONNIE ROGERS, ET AL.,
Plaintiffs-Appellants,

v.

DR. M. L. BROCKETTE, ET AL.,
Defendants-Appellees.

No. 78-2505.

United States Court of Appeals,
Fifth Circuit.

February 2, 1979.

School district brought action against state and others challenging constitutionality of state statute which required certain school districts to participate in subsidized breakfast program. The United States District Court for the Northern District of Texas, Robert W. Porter, J., granted summary judgment for defendants, and school district appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) rule against asserting third parties' claims did not bar school district from bringing action; (2) fact that state could defeat any judgment rendered in action simply by abolishing school district did not render court's opinion in the action advisory or hypothetical and would not deter court from allowing school district to bring the action; (3) school district was not precluded from bringing action

against state that created it, and (4) state statute which required certain school districts with a substantial number of children from poorer families to participate in federally subsidized breakfast program for school children was not inconsistent with federal school breakfast statutes and regulations and was not unconstitutional under the supremacy clause, since Congress, in establishing the federal breakfast program, indicated a trust in states generally, a desire not to limit states' control over the breakfast program, and indicated that state efforts to expand the program to reach poorer children were particularly favored.

Affirmed.

ROGERS v. BROCKETTE

Cite as 588 F.2d 1057 (1979)

1. Federal Civil Procedure ⇐103
Federal Courts ⇐12

In order to sue in federal court, plaintiff must allege a distinct and probable injury to himself, plaintiff must ordinarily assert his own legal rights and interests and cannot rest his claim to relief on legal rights or interests of third parties, and claim presented by plaintiff must present a genuine, live case or controversy under Article III. U.S.C.A.Const. art. 3, § 1 et seq.

2. Federal Civil Procedure ⇐103

In theory, a principal purpose of standing doctrine is to prevent the inappropriate party from forcing a judicial resolution of an issue.

3. Federal Civil Procedure ⇐103

One reason to confer standing on a party is to encourage court to approach the case from that party's point of view; the rule against asserting third parties' rights is intended partly to insure that court will approach case from point of view of those whom Congress wants to aid or protect or those whose rights Congress wants to vindicate.

4. Federal Civil Procedure ⇦103

The rule against asserting third parties' claims did not bar school district from bringing suit challenging state statute which required certain school districts to participate in subsidized breakfast program, since school district alleged that Congress had made it the proper body to decide at least some significant questions under the breakfast program, and since the most appropriate perspective for court to adopt in focusing on the issues presented by the action was that of the school district. V.T.C.A., Education Code § 21.914.

5. Federal Courts ⇦12

A federal court may not resolve hypothetical or contingent questions. U.S.C.A. Const. art. 3, § 1 et seq.

6. Federal Civil Procedure ⇦103

Injured party cannot sue unless exercise of court's remedial powers would redress the claimed injuries; there must be a substantial probability that, if court affords relief requested, plaintiffs' legal injuries will be remedied.

7. Elections ⇦12

Municipal Corporations ⇦27

State's decision to abolish or to reorganize municipality cannot violate a particular constitutional guarantee like the Fifteenth

Amendment, but the mere act of abolishing or reorganizing a municipality does not by itself invoke any constitutional provision. U.S.C.A.Const. Amend. 15.

8. Federal Courts ⇦13

Fact that state could defeat any judgment rendered in school district's action challenging state statute requiring certain school districts to participate in subsidized breakfast program simply by abolishing the school district did not render court's opinion in the action advisory or hypothetical and would not deter court from allowing school district to bring the action. U.S.C.A.Const. art. 3, § 1 et seq.

9. Federal Courts ⇦12

Federal court may not decide a case unless it presents a real and substantial controversy or a case in which one party has no active participation and over which it has exercised no control. U.S.C.A.Const. art. 3, § 1 et seq.

10. Schools and School Districts ⇦114

Both legally and practically, school district was sufficiently independent of state to bring suit against state challenging state statute requiring certain school districts to participate in subsidized breakfast program.

11. Schools and School Districts ⇦114

School district was not precluded from bringing action against state that created it

in order to challenge statute which required certain school districts to participate in subsidized breakfast program.

12. States ⇐4.13

State statute which required certain school districts with a substantial number of children from poorer families to participate in federally subsidized breakfast program for school children was not inconsistent with federal school breakfast statutes and regulations and was not unconstitutional under the supremacy clause, since Congress, in establishing the federal breakfast program, indicated a trust in states generally, a desire not to limit state's control over the breakfast program, and indicated that state efforts to expand the program to reach poorer children were particularly favored. Child Nutrition Act of 1966, §§ 4, 4(a, c), 42 U.S.C.A. §§ 1773, 1773(a, c); V.T.C.A., Education Code § 21.914; U.S.C.A. Const. art. 6, cl. 2.

Earl Luna, Thomas V. Murto, III, Dallas, Tex., for plaintiffs-appellants.

John L. Hill, Atty. Gen., Susan Dasher, Nathan Johnson, David M. Kendall, Jr., Robert Steve Bickerstaff, Jr., Asst. Attys. Gen., Austin, Tex., for defendants-appellees.

Paula Roberts, Roger Schwartz, Ronald Pollock, Food Research and Action Center, Washington, D.C., amicus curiae, for Food Research and Action Center.

Appeal from the United States District Court for the Northern District of Texas.

Before SKELTON,* Senior Judge and GOLDBERG and FAY, Circuit Judges.

GOLDBERG, Circuit Judge:

Since 1966 the federal government has subsidized breakfasts for school children. Participation in this school breakfast program is voluntary, but Congress left it unclear whether the choice to participate is to be made by the individual school, the local school board, or the state. A Texas state statute requires certain school districts to participate. One of those districts, the Garland Independent School District (GISD), resisted and filed this suit in federal district court for declaratory and injunctive relief. GISD named state education authorities as defendants and claimed that the Texas statute is unconstitutional because it conflicts with the federal program.

The district court granted summary judgment for the defendants, and GISD appeals. We are faced with a question of standing as well as the substantive issue of whether the Texas statute violates federal law.

* Senior Judge, United States Court of Claims, sitting by designation.

I.

The school breakfast program is one of several federal programs[1] designed to improve the nutrition of school children. It is administered by the Department of Agriculture. *See* 42 U.S.C. §§ 1771, 1779. Participating schools must agree to abide by several regulations governing the quality and availability of the breakfasts. *See generally* 7 C.F.R. § 220.8. Children from poorer families are eligible to receive the breakfasts free or at a reduced price. *See* 7 C.F.R. §§ 220.19, 245.1–245.11. A participating school receives a subsidy for each breakfast it serves; free breakfasts, naturally, are subsidized at a higher rate than reduced price or full-price breakfasts. *See* 7 C.F.R. § 220.9.

Federal law does not require any school, school district, or state to participate in the breakfast program. But in 1977, Texas enacted a statute, § 21.914 of Title 2 of its Education Code, providing:

> If at least 10 percent of the students enrolled in one or more schools in a school district are eligible for free or reduced-price breakfasts under the national school breakfast program . . . the governing board of the district shall participate in the program and make the benefits of the program available to all eligible students in said schools.

1. *See, e. g.*, 42 U.S.C. §§ 1751–1769a (school lunch program); *id.* at § 1772 (special milk program); *id.* at § 1773 (school breakfast program).

GISD does not currently serve breakfasts in its schools and does not wish to subscribe to the federal breakfast program. Section 21.914, however, would require GISD to serve federally subsidized breakfasts in at least twenty-two of its schools. GISD says that in order to do so it would have to spend approximately $26,000 to modify its buildings and purchase new equipment, and then spend an additional $114,000 annually for salaries and utilities. These expenses, it says, would not be covered by federal reimbursements.[2]

GISD claimed that § 21.914 is void under the supremacy clause because it conflicts with the statutes establishing the federal school breakfast program and with regulations issued pursuant to those statutes. Specifically, GISD says that the state statute, mandating the participation of certain school districts, conflicts with the federal statute and regulations, which, according to GISD, give it the right to refuse to participate. The members of GISD Board of Trustees in their official capacities joined in the suit, as did several taxpayers in the

2. *See* footnote 3 *infra*.

Garland School District. The United States District Court for the Northern District of Texas granted summary judgment for the defendants. It held that none of the plaintiffs had standing to bring the suit; it also ruled that there was no conflict between § 21.914 and the federal program. For reasons we give in the next section we believe that plaintiff GISD has standing. Since the district court had jurisdiction over GISD's claim,[3] we can reach the merits without deciding whether the suit could have been brought by taxpayers of the GISD or by members of the GISD board of trustees suing in their official capacities. On the merits we affirm the district court's decision.

II.

Texas asserts that GISD has no standing to bring this suit. Texas relies entirely on a

3. GISD claims that participating in the program will force it to spend well over $10,000 on equipment, utilities, and additional salaries. Since the federal government will not necessarily reimburse GISD for those expenses, *see* 42 U.S.C. §§ 1773(d), 1774, we cannot say "to a legal certainty," *St. Paul Mercury Indemn. Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845 (1938), that $10,000 or less is in controversy. Thus, the district court had jurisdiction over GISD's claim. 28 U.S.C. § 1331(a). *See also Opelika Nursing Home, Inc. v. Richardson*, 448 F.2d 658, 663 (5th Cir. 1971).

line of cases which, it claims, hold that a municipality has no standing to sue the state of which it is a creature, *see, e. g., Williams v. Mayor of Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182, 187, 43 S.Ct. 534, 67 L.Ed. 937 (1923), and argues that these decisions require us to deny standing to a political subdivision attempting to sue the state that created it. But before we can discuss these decisions, we must decide whether GISD can bring this suit under the more general principles developed by the Supreme Court to govern standing in all federal cases.

A.

[1] Three of those principles are particularly important here. First, in order to sue in federal court, a plaintiff must allege "a distinct and palpable injury" to itself. *E. g., Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Second, ordinarily a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* at 499, 95 S.Ct. at 2205. Third, a claim must present

a genuine, live case or controversy[4] under Article III.[5] In this case GISD has alleged $26,000, plus $114,000 annually, worth of "threatened or actual injury," *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). This satisfies the first requirement, but the other two criteria pose more difficult problems.

It might be argued, for example, that GISD is asserting not its own rights but the rights of its trustees, who are literally third parties. GISD seems to assert, and can

4. Depending on how broadly it is interpreted, this requirement is either identical with or an aspect of the rule that a case must be "justiciable." *See generally Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 1949-50, 20 L.Ed.2d 947 (1968). Standing is also an aspect of justiciability. *Id.* at 1950.

5. These three criteria, among others, were in effect specified by the Supreme Court in its most recent substantial treatment of standing. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, — U.S. —, 98 S.Ct. 2620, 2630-34, 57 L.Ed.2d 595 (1978). To be precise, the Court made explicit the constitutional requirement of injury in fact and the "general prudential" rule that a party can usually assert only its own claims. *Id.* at 2631, 2634. Instead of speaking of the need for a genuine case or controversy, however, it said that a plaintiff must establish a reasonable "causal connection between the claimed injury and the challenged conduct," *id.* at 2630. As we discuss, this is a variation of the requirement of a real controversy. *See* p. 1063 and n. 12 *infra*.

plausibly assert,[6] only one right allegedly arising under the federal breakfast statutes—the right to decide, on the local level, whether to accept the breakfast program. This right, instead of belonging to the GISD itself, may belong to the members of the GISD board of trustees; there is some authority that members of a governmental body have an "interest in maintaining the effectiveness of their votes," *Coleman v. Miller*, 307 U.S. 433, 438, 59 S.Ct. 972, 975, 83 L.Ed. 1385 (1939), which entitles them to sue if the body is deprived of some lawful prerogative. *See id.* (state legislators); *Kennedy v. Sampson*, 167 U.S.App.D.C. 192, 511 F.2d 430 (1974) (United States Senators). *See also Board of Educ. v. Allen*, 392 U.S. 236, 241 n.5, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (school board members' oath to support Constitution gives them standing to challenge constitutionality of statute they must administer). If this right does belong solely to the members of the GISD board of

6. *See* note 9 *infra*. If GISD claimed that the federal statutes are intended to protect school districts against possible expenses resulting from the state's imposing the program, it would be asserting its own right to such protection. But as our discussion of the merits suggests, *see* Part III *infra*, that claim is far weaker than the claim that Congress intended simply to protect the right to decide whether to accept the program.

trustees, the GISD itself ordinarily[7] would be barred from asserting it by the principle that a party can assert only its own claims and not those of a third party.[8]

[2] We believe, however, that the policies underlying this principle dictate that the GISD itself be allowed to assert the supposed right to decide whether to accept

7. There are some exceptions to this principle that a litigant can assert only its own claims and not those of a third party, *see, e. g., Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), but we need not decide if any are applicable here.

8. This requirement serves much the same function as the rule, apparently applicable at least in determining standing under § 10(a) of the Administrative Procedures Act, 5 U.S.C. § 702, that a complaining party has standing if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Also, as the Supreme Court has noted, *Duke Power Co. v. Carolina Environmental Study Group*, — U.S. —, 98 S.Ct. 2620, 2634, 57 L.Ed.2d 595 (1978), the limit on asserting third parties' claims "bear[s] some resemblance" to the requirement, applied only in taxpayers' suits, *id.* at 2633-34, that a plaintiff show a "nexus" between its injury and the legal right it asserts. *See Flast v. Cohen*, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

the breakfast program. For example, one reason for prohibiting a litigant from asserting another person's rights is to ensure that the inappropriate party cannot force an issue to be decided in court, or, as the Supreme Court has said, to "avoid . . . the adjudication of rights which those not before the Court may not wish to assert." *Duke Power Co. v. Carolina Environmental Study Group*, — U.S. —, 98 S.Ct. 2620, 2634, 57 L.Ed.2d 595 (1978). For better or worse, it is a premise of the federal judicial system that not all disputes are to be resolved in court. And this premise suggests that if a dispute can be resolved in some other way to the satisfaction of those most concerned, that resolution should not be upset by a court. The limits on asserting third parties' rights ensure that such a resolution will not be upset by those whom the legislature was not interested in protecting. *Cf.* Stewart, The Reformation of American Administrative Law, 88 Harv.L.Rev. 1667, 1735-36 (1975) (requirement of an actual injury protects such resolutions from being upset by those who are not affected at all). Of course, these principles do not excuse or justify a narrow and cramped approach to standing that excludes persons who are entitled to relief and can gain it only in a court. And in many cases it will be appropriate, for a variety of reasons, to permit a

litigant to assert another party's rights. *See generally* Note, Standing to Assert Constitutional Jus Tertii, 88 Harv.L.Rev. 423 (1974). In theory, however, a principal purpose of standing doctrine is to prevent the inappropriate party from forcing a judicial resolution of an issue.

When we apply this theory to GISD's claim we are compelled to conclude that the GISD is an appropriate party to force a judicial resolution of the issue it raises. GISD alleges that Congress has made it the proper body to decide at least some significant questions under the breakfast program. This is not a frivolous allegation, so for the purposes of deciding this preliminary question of standing we must assume that it is correct.[9] If Congress did repose

9. In *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), the Supreme Court rejected the view that a plaintiff has standing only if it can show a "protected legal interest"; that inquiry, the Court said, "goes to the merits", and standing is a preliminary issue. *Id.* at 153, 90 S.Ct. 827, 830. The Court then specified that an injured party has standing if it asserts an interest "*arguably* within the zone of interests to be protected . . . by the statute . . . in question." *Id.* (emphasis added). This test seems to align the inquiry into standing with the test for federal question jurisdiction, which is that a complaint asserting a federal claim can be dismissed for lack of jurisdiction only if it is "wholly insubstantial and frivolous" or "patently without merit." *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

such powers in the GISD, it plainly wanted GISD to affect decisions about whether and when the program was adopted. This suggests that Congress would not have objected to GISD's forcing a judicial resolution of a conflict between itself and the state over this issue. By contrast, a suit by an interested outsider might upset a political accommodation acceptable to GISD, the party which, by hypothesis, is entitled to decide what should be accepted.

[3] We are led to the same conclusion—that GISD should be allowed to bring this suit—by another policy underlying the rule against claiming third parties' rights. One reason to confer standing on a party is to encourage the court to approach the case from that party's point of view; the rule against asserting third parties' rights is intended partly to ensure that the court will approach the case from the point of view of those whom Congress wants to aid or protect or whose rights Congress wants to vindicate. A case arising under a statute restricting a bank's activities, for example, may appear in one light when seen from the point of view of the bank's competitors and quite another from the perspective of the bank's customers. The decision whether the customers or competitors have standing to raise a claim is important partly because

it affects the way the court is likely to focus on the issues.[10]

[4] In this case the most appropriate perspective for us to adopt in focusing on the issues is that of the GISD. The issue in this case is whether GISD or the state has been empowered, by Congress, to make a certain central decision about the breakfast program. The school board and the state represent different political interests with different degrees of influence; a group can be a statewide minority, for example, but a majority in certain localities. The issue we must decide, then, is which particular combination of interests Congress intended to protect and promote. We can best focus on this issue by having before us the repre-

10. This example is suggested by *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). There the Court granted banks' competitors standing to challenge an agency's decision that various activities were permitted by the National Banking Act, 12 U.S.C. § 24(7). Commentators have criticized the decision on the ground that it led the Court to examine issues under the Act from the competitors' point of view when the Act is more plausibly seen as an effort to protect customers. As a result, commentators say, the Court's interpretation of the Act was distorted. *See* Stewart, *supra*, 88 Harv.L.Rev. at 1732–33. Instead of simply granting standing to the competitors, these commentators say, the Court should have recognized an exception to the rule against raising third parties' claims and allowed the competitors standing explicitly to assert the customers' rights. *See id.* at 1733.

sentatives of the two competing combinations of interests. In other words, the school board itself should assert the plaintiff's case. The perspective we might adopt if a taxpayer brought this suit, for example, might be significantly different, and would be less likely to focus our attention on the combination of interests Congress was attempting to protect when, and if, it empowered the school board to accept or reject the breakfast program.[11] For these reasons, the rule against asserting third parties' claims does not bar GISD from bringing this suit.

[5, 6] There remains only the third requirement; this litigation must present a genuine case or controversy under Article III. One aspect of the requirement of a genuine case or controversy is the principle that a federal court may not resolve "hypothetical or contingent questions." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 89 L.Ed. 1725 (1945). Nor may a federal court render advisory opinions. *E. g., Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 1950–51, 20

11. We do not mean to decide whether the taxpayers would have had standing to bring this suit. We do mean to say, however, both that GISD has standing and that in many ways it is an especially appropriate plaintiff, so that our decision to confer standing on it and to pretermit the claims of the taxpayers and the individual members of the GISD board of trustees suing in their official capacities, *see* p. 1061 *supra*, was not arbitrary.

L.Ed.2d 947 (1968); *United States v. Freuhauf*, 365 U.S. 146, 81 S.Ct. 547, 554, 5 L.Ed.2d 476 (1961). As the Supreme Court has recently emphasized in a context that is only slightly different, an injured party cannot sue unless "the exercise of the Court's remedial powers would redress the claimed injuries." *See Duke Power Co. v. Carolina Environmental Study Group*, —— U.S. ——, 98 S.Ct. 2620, 2631, 57 L.Ed.2d 595 (1978). There must be a "substantial probability . . . that, if the court affords the relief requested," the plaintiffs' legal injuries will be remedied. *See Warth v. Seldin*, 422 U.S. 490, 504, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975).[12]

12. The Court has equated this principle to its rule that a plaintiff has no standing unless its injuries "fairly can be traced to the challenged action of the defendant," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41, 43, 96 S.Ct. 1917, 1925, 1926, 48 L.Ed.2d 450 (1976). *See also Warth v. Seldin*, 422 U.S. 490, 504, 506-07, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In the recent cases discussing this rule, the issue had been whether the actions of some "third part[y] not before the court," *see Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264, 97 S.Ct. 555, 50 L.Ed.2d 450 (1976), would nullify the court's decree and leave the plaintiff with no relief from its injuries, *see Duke Power Co. v. Carolina Environmental Study Group*, - U.S. ——, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); here the danger is that the defendant itself will nullify the judgment. These decisions have been severely criticized. *See, e. g.* Sager, Insular Majorities Unabated: *Warth v. Seldin* and *City of Eastlake v. Forest City Enterprises, Inc.*, 91 Harv.L.Rev. 1373, 1382-88 (1978). But there seems to be little disagreement with their premise that in our system federal courts will act only if a favorable decree would significantly increase the plaintiff's chances of gaining some cognizable legal benefit. Compare *id.* at 1385-88 *with Warth v. Seldin*, 422 U.S. 490, 504, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

In the case before us it might be thought that our judgment is unlikely to relieve the plaintiffs' injury because Texas can defeat any judgment simply by abolishing the GISD. For this reason, it might be argued, our decision would be purely advisory, or at least "hypothetical and contingent," and the requirements of Article III would be unmet.

[7] It is, to be sure, undisputed that Texas can abolish the GISD.[13] The United

13. We assume that the GISD is not claiming that the federal breakfast statutes require Texas to maintain local school boards or comparable entities; we take GISD to be arguing only that as long as school boards exist, they, and not state authorities, are entitled to decide whether to accept the breakfast program. Therefore we must determine whether Texas's power to abolish the GISD makes any judgment we might render an advisory opinion. In any event, since we reject GISD's more modest claim on the merits, *see* Part III *infra*, we would *a fortiori* reject the broader claim that Texas is obligated to maintain school districts. So even if GISD did make the broader claim we would have to discuss the effect on our jurisdiction of Texas's power to abolish GISD.

States Constitution contains no general[14] limit on a state's ability to abolish or reorganize a municipality or another political subdivision like a school district. *See e. g., Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 46, 52 L.Ed. 151 (1907). But it scarcely follows that because Texas can, in this sense, circumvent our judgment, our judgment would be only advisory or hypothetical. Texas can abolish the GISD only by enacting a statute; an administrative regulation will not suffice. *See* Tex.Educ. Code Ann. tit. 2, § 11.14. Moreover, the GISD performs a variety of functions connected with education. *See* p. 1065 *infra*. If Texas abolished the GISD it would presumably have to undertake many of those functions itself, and to that extent administer Garland schools directly.[15] This is a

14. A state's decision to abolish or to reorganize a municipality can, of course, violate a particular constitutional guarantee like the fifteenth amendment. *See, e. g., Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 128-29, 5 L.Ed.2d 110 (1960). But the mere act of abolishing or reorganizing a municipality does not by itself invoke any constitutional provision.

15. As we have said, we take GISD to be arguing that the federal statute empowers school districts to decide whether to accept the breakfast program, so long as school districts exist. *See* footnote 13, *supra*. If this view is correct, Texas would have to administer Garland schools directly to the degree necessary to make the GISD nonexistent for purposes of the federal statute.

heavy price to pay to avoid a judgment dealing with only one aspect of education. The political difficulty of passing a statute abolishing GISD in the face of the well-known tradition of local autonomy in education, and the burdens Texas would have to bear if it did take over a GISD's functions directly, convince us that there is at least a "substantial probability," *see Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975), that GISD would receive the fruits of a favorable judgment.

[8] The relatively few Supreme Court decisions addressing this issue reinforce our conclusion. The Court has indicated its willingness to decide a suit between states for money damages, in its original jurisdiction, even if it has no way to enforce its award against a recalcitrant loser, *see e. g., South Dakota v. North Carolina*, 192 U.S. 286, 24 S.Ct. 269, 275-77, 48 L.Ed. 448 (1904); the Court said that it was prepared to "rely on the good faith of state governments or other public bodies to respond to its judgments." *Glidden Co. v. Zdanok*, 370 U.S. 530, 571, 82 S.Ct. 1459, 1483-84, 8 L.Ed.2d 671 (1962) (plurality opinion). Here we have, as surely for Texas's good faith, the difficulty—practical and political—of circumventing our decision. Similarly, in *Glidden Co. v. Zdanok*, 370 U.S. 530, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962), the

Supreme Court agreed to review decisions of the Court of Claims even though large money judgments could, at that time, be enforced against the United States only if Congress specifically appropriated the funds. *See id.* at 1482–84.[16] The Court said that "Congress . . . has sought to avoid interfering with" the collection of Court of Claims judgments, and that historically parties awarded money judgments against the United States have had far more success in collecting than parties who won in private litigation. *Id.* at 1483. Similarly, the tradition of local autonomy in education seems long and powerful in Texas. *See generally San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 6–7, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Moreover, the *Glidden* court distinguished an earlier case, *Gordon v. United States*, 69 U.S. (2 Wall.) 561, 117 U.S. 697 (1885), in which the Supreme Court had refused to take jurisdiction over appeals of the Court of Claims when that court's judgments could be revised by the Secretary of the Treasury. This suggests that we should be influenced by the fact that the GISD can be abolished

16. Now there is a general appropriation of whatever sums are necessary to satisfy any judgment of the Court of Claims. 31 U.S.C. § 724a.

only by statute, not by an administrative rule or fiat. *See* p. 1064 *supra*. *See also Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948). Finally, in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the Supreme Court acknowledged that the President could "theoretically" revoke the regulation empowering the Watergate Special Prosecutor; but at least until the President did so, the Court held, litigation between the Special Prosecutor and the President was a justiciable controversy. *Id.* at 695–97, 94 S.Ct. 3090. The Court did mention that "the delegation of authority to the Special Prosecutor . . . [was] not an ordinary delegation by the Attorney General to a subordinate officer" because regulations provided that the special prosecutor was not to be removed without a "consensus" of certain members of Congress. 418 U.S. at 696, 94 S.Ct. at 3102.[17] But as we

17. The Court did not mention that this part of the regulation may have been unenforceable; it is not clear that members of Congress can participate in decisions to dismiss officers within the executive branch. *See* Freund, The Supreme Court, 1973 Term—Foreword: On Presidential Privilege, 88 Harv.L.Rev. 13, 16 n. 16 (citing *Myers v. United States*, 272 U.S. 52, 161–62, 47 S.Ct. 21, 71 L.Ed. 160 (1926)).

have noted, p. 1064 *supra*, Texas can disestablish the GISD only by passing a statute, not by administrative action. Moreover, in *United States v. Nixon* the Court emphasized "the unique facts of this case"; this may suggest that the key to the decision was the political cost of dismissing the Special Prosecutor. *See* The Supreme Court, 1973 Term, 88 Harv.L.Rev. 41, 52–53 (1974). For all of these reasons, the danger that our opinion will prove to be only advisory or hypothetical does not deter us from allowing GISD to bring this suit.

[9, 10] Closely related to the proscription of advisory opinions, however, is the principle that a federal court may not decide a case unless it "present[s] a real and substantial controversy," *Poe v. Ullmann*, 367 U.S. 497, 509, 81 S.Ct. 1752, 1759, 6 L.Ed.2d 989 (1961) (Brennan, J., concurring); in particular we may not decide a case in which one party "has no active participation" and "over which [it] has exercised no control." *United States v. Johnson*, 319 U.S. 302, 304–05, 63 S.Ct. 1075, 1076, 87 L.Ed. 1413 (1943). Some state agencies may well be so closely identified with the state government, and so thoroughly controlled by the body they are suing that the litigation amounts to a suit by the state against itself; such a suit lacks the live adversariness we must find before

we can entertain a case. *See South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 12 S.Ct. 921, 36 L.Ed. 712 (1892) (Court will not decide case in which plaintiff in error and defendant in error are controlled by same persons). *See also Fenner v. Continental Diving Service, Inc.*, 543 F.2d 1113 (5th Cir. 1976). The GISD is not this sort of agency, however. Both legally and practically, the GISD seems sufficiently independent of the state of Texas to ensure that a suit between them will be a genuinely adversary contest.

Legally, independent school districts in Texas have a variety of powers. They perform "all educational functions not specifically delegated" to the state education agencies. Tex.Educ.Code Ann., tit. 2, § 11.-01. They are specifically empowered to make contracts, *id.*, §§ 23.26, 23.28, to levy and collect taxes, *id.* § 23.27, to obtain property by eminent domain, *id.* § 23.31, and generally "to manage and govern the public free schools of the district," *id.* § 23.26(b). They can sue and be sued. *Id.*, § 23.26(a).

The state can, to be sure, supervise the local boards to some degree. The state education authorities may review local school boards' decisions, Tex.Educ.Code Ann., tit. 2, § 11.13, and the local boards are bound by regulations issued by the state

agency, *Bear v. Donna Ind. School Dist.*, 85 S.W.2d 797, 798 (Tex.Civ.App.1935). But local boards are then free to attack the state agency's decisions in court. *See e. g., Board of Trustees v. Briggs*, 486 S.W.2d 829 (Tex.Civ.App.1972). Thus it seems clear that local boards have some significant legal rights that the state agency cannot take away.

As a practical matter, too, local school boards seem likely to enjoy a good deal of freedom from state authorities. The members of the local boards are elected by the people of the district, not appointed from above. Tex.Educ.Code Ann., tit. 2, § 23.-10(b). Moreover, the local boards have their own funds. They can levy and collect taxes, *id.* § 23.27, and funds disbursed by the state to the districts become the property of the local board of trustees, which holds them in trust for the district; they cannot be taken away by the state. *Wright v. Houston Ind. School Dist.*, 393 F.Supp. 1149, 1155 (S.D.Tex.1975), *vacated and remanded on other grounds*, 569 F.2d 1383 (5th Cir. 1978); *Love v. City of Dallas*, 120 Tex. 351, 40 S.W.2d 20, 26 (1931). Thus in addition to its independent legal powers, the GISD seems likely to have a mind of its own; we think it improbable that its litigation will be controlled by the state authorities to any significant extent. We conclude, then, that GISD is sufficiently independent of the state of Texas to bring this suit.

This conclusion is supported, by analogy, by two recent Supreme Court decisions. In these decisions, the Court relied heavily on the premise that the actions of a school district are not to be treated as if they were the direct actions of the state. In other words, the school district and the state were to be treated as separate entities.

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), the Supreme Court upheld Texas's system of financing public education. Under that system a substantial portion of each school district's expenditures is financed by an ad valorem property tax levied by the district. Because the property in some districts has a higher assessed value, there are wide disparities in per-pupil expenditures among the school districts. The Court rejected a number of constitutional challenges to these inequalities, among them the argument that "the Texas system is unconstitutional . . . because it allows . . . the quality of education to fluctuate on the basis of the fortuitous positioning of boundary lines of political subdivisions." 411 U.S. at 53, 93 S.Ct. at 1307. The Court said:

> [A]ny scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others. . . .

Id. at 53-54, 93 S.Ct. at 1307; *see McGowan v. Maryland*, 366 U.S. 420, 427, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *cf. Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, 707-09 (1962), (Clark, J., concurring) (inequalities in legislative apportionment unconstitutional because unrelated to any coherent theory of representing local units of government); *Mahan v. Howell*, 410 U.S. 315, 325-26, 93 S.Ct. 979, 985, 35 L.Ed.2d 320 (1973) ("maintaining the integrity of political subdivision lines" justifies significant deviation from equality in apportionment of state legislature). It seems likely, however, that the Court accepted these disparities only because they resulted from an established system in which each school district regulated some of its own affairs. In other words, if there were no school districts and the state itself assessed and collected all taxes and then directly financed all public education in such a highly disparate fashion—in which expenditures varied

not just according to various residents' willingness to tax themselves but according to the value of neighboring property—we strongly suspect that the Court would not have accepted the disparities. If we are correct, then the *Rodriguez* Court was refusing to treat the actions of school districts as if they were the direct acts of the state itself.

Milliken v. Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), also suggests that school districts' actions are not to be treated as if they were the direct acts of the state. *Milliken* held that a federal court's remedy for unconstitutional school segregation had to take account of school district lines drawn by the state.

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.
>
> . . . . .
>
> The [district] court's analytical starting point was its conclusion that school district lines are no more than arbitrary lines on a map drawn "for political convenience." . . . [This] notion that

> school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.

Id. at 744–45, 741, 94 S.Ct. at 3125, 3127.

Milliken did not, however, suggest that a state might insulate itself from a decree remedying its own constitutional violations merely by drawing "arbitrary lines on a map," *see* 418 U.S. at 741, 94 S.Ct. at 3125. Rather, the *Milliken* Court emphasized that school districts are traditional units of local government, *see* 418 U.S. at 741–42, 94 S.Ct. at 3125–3126, with a variety of functions, *see id.* at 742, 94 S.Ct. at 3126, n. 20, and subject to local control, *see id.* at 742, 94 S.Ct. at 3126, and suggested that for these reasons a school district's violations were to be attributed only to it and not to the state. *See id.* at 770, 777–79, 94 S.Ct. at 3139, 3143–44 (White, J., dissenting). *Milliken* and *Rodriguez*, then, agree on a central principle: the actions of certain sorts of political subdivisions are not always to be treated as if they were the direct acts of the state itself. It follows that the decision to sue Texas which was made by the GISD—a subdivision much like

those involved in *Milliken* and *Rodriguez*[18]—was not a decision by the state to sue itself but the decision of a government that is treated, for at least some constitutional purposes, as an independent actor. Strictly as a matter of logic, it does not follow that the state and the school district are distinct entities for Article III purposes. But the analogy to *Rodriguez* and *Milliken* does support our conclusion that we are presented with a sufficiently live controversy under Article III.

Under the criteria normally governing standing to sue in federal court, then, GISD would be able to bring this suit against Texas.

B.

[11] Texas, however, cites a series of Supreme Court decisions which seem to hold that a municipality[19] cannot sue the state that created it. In some of these

18. *Rodriguez* was a suit against another independent school district in Texas, and Michigan school districts like the one involved in *Milliken* show many of the characteristics of Texas independent school districts. *Compare* 418 U.S. at 742, 94 S.Ct. at 3126 n. 20 with pp. 1065–66 *supra*.

19. For purposes of this analysis, the Garland Independent School District may be treated as a municipality, *cf. Harkless v. Sweeny Ind.*

cases the state altered the municipality's boundaries or consolidated different municipalities; *Hunter v. Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), is usually considered the leading example.[20] In other cases, of which *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923) is typical, the state attempted to modify a grant or charter it had previously given to the municipality.[21] Invariably federal

School Dist., 427 F.2d 319, 321 (5th Cir. 1970), *cert. denied*, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971) (school district is to be treated as municipality for purposes of susceptibility to suit under 42 U.S.C. § 1983), because the reasoning of the cases cited by Texas applies to all political subdivisions created by a state.

20. *See e. g., Williams v. Eggleston*, 170 U.S. 304, 18 S.Ct. 617, 42 L.Ed. 1047 (1898); *Town of Mt. Pleasant v. Beckwith*, 100 U.S. 514, 525, 25 L.Ed. 699, 701 (1880); *Comm'rs of Laramie County v. Comm'rs of Albany County*, 92 U.S. 307, 23 L.Ed. 552 (1876); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254–55 (5th Cir. 1976).

21. *See, e. g., Pawhuska v. Pawhuska Oil Co.*, 250 U.S. 394, 39 S.Ct. 526, 63 L.Ed. 1054 (1919); *New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79, 12 S.Ct. 142, 35 L.Ed. 943 (1891); *East Hartford v. Hartford Bridge Co.*, 13 L.Ed. 518, 10 How. 511 (1850). *See also Williams v. Mayor of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *Worchester v. Street Ry. Co.*, 25 S.Ct. 327, 49 L.Ed. 591 (1905).

courts have ruled against the municipality's claim that the state actions violated the municipality's rights under the contract clause, *see, e. g., Railroad Comm'n v. Los Angeles R.R.*, 280 U.S. 145, 156, 50 S.Ct. 71, 74 L.Ed. 234 (1929); *Hunter v. Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254–55 (5th Cir. 1976) or the just compensation clause, *see, e. g., City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923), or the due process, *see, e. g., id.; Northwestern School Dist. v. Pittenger*, 397 F.Supp. 975, 979 (W.D.Pa.1975), or equal protection clauses, *see, e. g. Williams v. Mayor of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Newark v. New Jersey*, 262 U.S. 192, 43 S.Ct. 539, 67 L.Ed. 943 (1923); *Williams v. Eggleston*, 170 U.S. 304, 18 S.Ct. 617, 42 L.Ed. 1047 (1898). *See also Risty v. Chicago, R. I. & Pac. R.R.*, 270 U.S. 378, 46 S.Ct. 236, 241, 70 L.Ed. 641 (1926); (fourteenth amendment); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973) (various constitutional claims). While these cases do not always speak of standing, the Supreme Court has said that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or

the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *Coleman v. Miller*, 307 U.S. 433, 441, 59 S.Ct. 972, 976, 83 L.Ed. 1385 (1939). And these decisions are frequently said to establish that a municipality has no standing to sue the state that created it. *See, e. g., Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974); P. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System (2d ed.) 182 (1973). Some of the language in the opinions is indeed broad enough to support this interpretation. *See, e. g., Williams v. Mayor of Baltimore*, 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."); *City of Trenton v. New Jersey*, 262 U.S. 182, 187, 43 S.Ct. 534, 537, 67 L.Ed. 937 (1923) ("[A] municipality is merely a department of the state, and the state may withhold, grant or withdraw powers or privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will."). *See also Hunter v. Pittsburgh*, 207 U.S. 161, 178–79, 28 S.Ct. 40, 52 L.Ed. 151 (1907).

We believe, however, that these decisions, properly interpreted, do not require us to deny GISD standing in this case. The Supreme Court itself said, in a somewhat different context from that facing us here, that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases." *Gomillion v. Lightfoot*, 364 U.S. 339, 344, 81 S.Ct. 125, 128, 5 L.Ed.2d 110 (1960). We agree. We think these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state of which it is a creature. In fact, correctly interpreted, these cases do not deal with "standing," in the sense in which we use the term, at all. We reach these conclusions for several reasons.

The *Hunter* and *Trenton* line of cases are descendents of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819). That great case prohibited New Hampshire from modifying a charter that the colonial government had issued to Dartmouth College. Applying the contract clause to the charters and grants of a

government, however, created a serious problem; many state actions might be said to be contracts with those who benefitted from them, and a state barred from impairing any such contract would be practically unable to legislate in large, important areas.

> [T]he word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend . . . to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation.

Id. 17 U.S. (4 Wheat.) at 627, 4 L.Ed. at 657. Such an interpretation of the contract clause, said Chief Justice Marshall, writing for the Court, "would be an unprofitable and vexatious interference with the internal concerns of a state," and would be "unnecessary, . . . mischievous, and . . . repugnant to [the] general spirit" of the Constitution. *Id.*

To solve this problem the *Dartmouth College* Court distinguished between two types of state actions. The contract clause applied to grants of "private" powers, or grants to private institutions. Allocations and regulations of "political" powers, however, were exempt from the contract clause. 17 U.S. (4 Wheat.) at 630, 629, 4 L.Ed. at 657. And while *Dartmouth College* itself

dealt with the contract clause alone, Chief Justice Marshall's reasoning was broader; he erected the general principle that the entire Constitution does not interfere in a state's internal organization of its political functions.

> [T]he framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and . . . the instrument they have given us is not to be so construed.
>
> . . . . .
>
> If the act . . . be a grant of political power, if it create a civil institution to be employed in the administration of government . . . the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

17 U.S. (4 Wheat.) at 629-630, 4 L.Ed. at 657.

As we read them, the *Hunter* and *Trenton* line of cases are simply faithful to this principle of *Dartmouth College*. They hold that the Constitution does not interfere in the internal political organization of states. Decisions in the *Hunter* and *Trenton* line

dealing with claims under the equal protection or due process clauses, *see* pp. 1067–68 *supra*, extend this principle to the fourteenth amendment. In some respects the Court has retreated from this absolute position, *see, e. g. Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *id.* at 128–29 (citing cases), but these retreats are not our present concern. Our point is that *Hunter*, *Trenton*, and allied cases are substantive holdings that the Constitution does not interfere in states' internal political organization. They are not decisions about a municipality's standing to sue its state.

Hunter itself confirms our view; it continues the *Dartmouth College* distinction between allocations of political or public powers, on the one hand, and allocations of private powers, on the other. After a classic description of the unlimited power of states over municipalities, the *Hunter* Court said:

> It will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by

> private corporations or individuals. . . . it has been held that, as to the latter class of property, the legislature is not omnipotent.

28 S.Ct. at 47. *See also City of Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 537–38, 67 L.Ed. 937 (1923). The Court went on to acknowledge, implicitly, that a municipality could raise the claim that its "private" contract and property rights had been impaired. *Id.*[22] This acknowledgement is, of course, flatly inconsistent with the position that a municipality can never sue the state that created it.

The opinions in the *Hunter* and *Trenton* line do occasionally—but by no means uniformly—speak of "standing," and deny that a municipality has "standing" to sue the state. But when those cases were decided, "standing" generally meant something somewhat different from what it means today. A party had standing—or a "right to sue"—if it was correct in its claim on the merits that the statutory or constitutional provision in question protected its interests; standing was not seen as a preliminary or threshold question. *See, e. g. Tennessee*

22. More recently the Supreme Court has intimated that this distinction between the public and private rights of a municipality is not extinct. *See Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 128, 5 L.Ed.2d 110 (1960).

Electric Power Co. v. TVA, 306 U.S. 118, 139–40, 59 S.Ct. 366, 83 L.Ed. 543 (1939); *Ashwander v. TVA*, 297 U.S. 288, 343, 56 S.Ct. 466, 481, 80 L.Ed. 688 (1936) (Brandeis, J., dissenting); Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief, 83 Yale L.J. 425, 427–42 (1974). In speaking of "standing," cases in the *Hunter* and *Trenton* line meant only that, on the merits, the municipality had no rights under the particular constitutional provisions it invoked. This is why the *Hunter* and *Trenton* series of cases did not mention the criteria we now associate with inquiries into standing—the extent of an actual injury and of a genuine case or controversy, for example. When we applied these criteria, *see* pp. 1060–67, *supra*, we found no bar to conferring standing on GISD in this case.

The *Hunter* and *Trenton* cases, then, do not deal with standing; they adhere to the substantive principle that the Constitution does not interfere with a state's internal political organization. This principle is not relevant to the case before us. GISD's claim is that *Congress*, exercising its power under Article I, has interfered with Texas's internal political organization, at least to the extent of allowing a school district to ignore the state's mandate and to decide for itself whether to accept the breakfast program. There is every reason to think that

Congress may interfere with a state's internal political organization in ways that the Constitution itself does not interfere; the Supreme Court has never said otherwise. *See City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.) *cert. denied*, 412 U.S. 950, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973); *NAACP v. Wilmington Medical Center, Inc.*, 426 F.Supp. 919, 926 n.1 (D.Del.1977); *Triplett v. Tiemann*, 302 F.Supp. 1244 (D.Nev.1969). The Court has, to be sure, limited Congress's power in a way faintly analogous to the *Dartmouth College* distinction between private and governmental powers; it has held that Congress may not "impermissibly interfere with the integral governmental functions" of states and their subdivisions. *National League of Cities v. Usery*, 426 U.S. 833, 851, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976). It is unclear whether this limitation ever applies to an act of Congress which, like the breakfast program, does not necessarily require anything of the states or their subdivisions but only offers funds to states or subdivisions which comply with certain conditions.[23] Our decision on the merits, *see* Part III *infra*, makes it

23. In *Massachusetts v. Mellon*, 262 U.S. 447, 482, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), the Supreme Court held that a state may not challenge such an optional federal spending program, partly because "the statute [does not]

unnecessary to discuss whether this limit on Congress's power would keep it from doing what GISD claims it has done, *cf. Public Utility Dist. No. 1 v. FPC*, 113 U.S.App.D.C. 363, 366–68, 308 F.2d 318, 321–23 (1962), *cert. denied*, 372 U.S. 908, 83 S.Ct. 719, 9 L.Ed.2d 716 (1963) (FPC may empower municipality to condemn land despite state statute prohibiting municipality from doing so); *Alabama NAACP State Conference of Branches v. Wallace*, 269 F.Supp. 346 (M.D. Ala.1967) (declaring unconstitutional a state statute prohibiting localities from obtaining federal money by complying with federal desegregation guidelines), for we hold that GISD is incorrect in asserting that Congress has empowered school districts to decide for themselves whether to accept the breakfast program. But in any event these are substantive limits on Congress's power. They are not material to our inquiry into GISD's standing. We conclude that the *Hunter* and *Trenton* line of cases do not, properly speaking, deal with a municipality's standing to sue the state that created it. Therefore they do not deny GISD standing to bring this suit.

require the states to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." 43 S.Ct. at 599.

III.

[12] GISD contends that § 21.914 is inconsistent with the federal school breakfast statutes and regulations and therefore unconstitutional under the supremacy clause. For the most part, GISD relies on a section of the principal statute establishing the breakfast program and on one of the regulations. The statute, 42 U.S.C. § 1773(a), provides in part:

> There is hereby authorized to be appropriated such sums as are necessary to . . . assist the States through grants-in-aid and other means to initiate, maintain, or expand nonprofit breakfast programs *in all schools which make application for assistance* and agree to carry out a nonprofit breakfast program in accordance with this chapter.

(emphasis added). The regulation, 7 C.F.R. § 220.7(a), says that "The School Food Authority shall make written application to the state agency . . . for any school in which it desires to operate the School Breakfast Program . . . ." The "School Food Authority" is defined as "the governing body which is responsible for the administration of one or more schools and which has legal authority to operate a breakfast program therein." 7 C.F.R. § 220.2(w). GISD argues in effect that the

phrase "in all schools which make application for assistance" in § 1773(a) implies that no school which has not applied shall have the program forced on it. And GISD of course argues that the School Food Authority is the school board, and that § 220.7(a) expressly gives it the power to decide whether to accept the breakfast program.

These texts alone do not settle the issue. Section 1773(a) says "schools," not "school boards," and GISD does not seem to contend that each individual school can decide to reject the program.[24] In any event, this interpretation of the statute would make the very regulation GISD relies on illegal. Moreover, the same sentence speaks of "assist[ing] the States," suggesting that the states have primary responsibility over the breakfast program.

In fact, the legislative history indicates that this portion of § 1773(a) has nothing to do with specifying the local body which is to decide whether to participate. The earlier version of the first sentence of § 1773(a) had read:

> "There is hereby authorized to be appropriated for each of the fiscal years 1972 and 1973 not to exceed $25,000,000

24. One federal court has rejected this interpretation of the statute. *See Torres v. Butz*, 397 F.Supp. 1015 (N.D.Ill.1975).

> to carry out a program to assist the States through grants-in-aid and other means to initiate, maintain, or expand nonprofit breakfast programs in schools."

See 42 U.S.C.S. § 1773. This was a limited authorization; it provided funds for the program in only some of the schools that wanted to participate. In 1972 Congress decided to authorize enough funds to provide breakfasts in every school that wanted to participate. *See* S.Rep. No. 92-1027, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Admin.News, pp. 3380, 3392. Not unnaturally, it said so by rewriting the statute to authorize "such sums as are necessary [to fund the program] in all schools which make application . . . ." There is no indication that Congress intended to change § 1773(a) from an authorization of funds into a provision dealing with the relative powers of states and local school boards.

The regulation cited by GISD, 7 C.F.R. § 220.7(a), similarly is not dispositive. It may just be a traffic control device specifying the agency that is to handle paperwork connected with the application. See *id.*; *id.* § 220.7(b) (administrative responsibilities associated with application). Moreover, a "School Food Authority" is defined as the body "which has legal authority to operate a breakfast program." 7 C.F.R. § 220.2(w).

Presumably it is state law which defines the legal authority of various local bodies; by enacting § 21.914 Texas has removed from GISD the legal authority to decide whether to participate in the program. Of course, § 1773(a) and 7 C.F.R. § 220.7(a) lend no support to Texas's argument that the federal program permits statutes like § 21.914, but they do not decide the case in GISD's favor either. They leave the question open.

We must, therefore, examine the statutory and regulatory scheme, and the legislative history, in an effort to answer two questions. First, in establishing the federal breakfast program, did Congress indicate any general distrust of state governments? That is, did Congress seem to believe that decisions made by local school boards would, in general, better effectuate the policies of the program? And second, even if Congress expressed no *general* reluctance to allow state governments to make decisions about the breakfast program, does this particular Texas statute, mandating breakfast programs in schools with a substantial number of children from poorer families, clash with any specific congressional policy?

There are few signs that Congress and the Department of Agriculture generally distrusted state governments; indeed the evidence is rather that Congress wanted to

involve the states fully in the administration of the program. The state educational agencies receive the local authorities' applications, 42 U.S.C. § 1773(a), and enter into contracts with local schools or school districts to run the program, 7 C.F.R. § 220.7(a). Subject to the federal guidelines, the state authorities can set the rates at which school districts will be reimbursed. 7 C.F.R. § 220.9. They decide which school districts will receive additional payments if the uniform national rates of reimbursement do not cover all their costs. 42 U.S.C. § 1773(d); 7 C.F.R. § 220.9(c). Under an earlier version of the breakfast program, when only limited funds were authorized, states could select—according to certain federal criteria—the schools that would be permitted to participate in the programs; now states can, at least, still choose which schools to reimburse if appropriated funds are insufficient to reimburse all the schools that want to participate. *See* 42 U.S.C. § 1773(c). All of these tasks require the state to make important and potentially controversial decisions. Congress would not have assigned them to the states if it distrusted the states, wanted to insulate local school boards from the states' mandates, or thought that local boards' decisions were

singularly likely to further the policies of the program.[25]

Finally, § 21.914 itself seems quite consistent with the policies of the federal breakfast program. In many ways, Congress made clear its desire to expand the program generally. Perhaps even clearer is Congress's particular concern that as many poor children as possible be served free or reduced-price breakfasts.[26]

The policy in favor of expanding the program is made explicit in 42 U.S.C. § 1773(g), which provides:

> As a national nutrition and health policy, it is the purpose and intent of Congress that the school breakfast program be made available in all schools where it is

25. The legislative history contains several suggestions that states, as well as localities, should be closely involved in the program. *See, e. g.*, House Rep. No. 1802, 89th Cong., 2d Sess., *reprinted in* [1966] U.S.Code Cong. & Admin. News, pp. 3180, 3180, 3182, 3187. There are even indications that Congress envisioned that the states would decide whether to participate. *See, e. g., id.* at 3182; House Rep. No. 91-81, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Admin.News, pp. 3014, 3019 (Additional Views of William A. Steiger of Wisconsin).

26. It follows, of course, that our decision does not suggest that a state could constitutionally require a school or school board to *reject* the breakfast program.

> needed to provide adequate nutrition
> . . . .

In addition, participating states are required to submit to the Secretary of Agriculture, annually, a plan demonstrating their intention "to use the funds provided under [the school breakfast program] . . to the maximum extent practicable to reach needy children." 42 U.S.C. § 1759a(e)(1)(C). The regulations specify that "state agencies have a positive obligation . . . to extend the benefits of the School Breakfast Program to children attending schools where poor economic conditions exist." 7 C.F.R. § 220.7(c). Arguably, these provisions themselves authorize state statutes like Texas's § 21.914, requiring school districts with a high percentage of poorer children to participate; in any event, they reveal Congress's hospitality to such state statutes. In the past, when Congress did not authorize enough funds to reimburse every school that wanted to participate in the program, it made its concern with reaching poor children even more explicit; in selecting the schools that would participate, states were to give priority to schools with children from poorer areas, *see* 42 U.S.C. § 1773(c), and to schools in which "there is a special need for improving the nutrition and dietary practices of children of working mothers and children from low-income families." *Id.* Now that Congress

has authorized funds sufficient to cover all schools that want to participate, *see* p. 1072 *supra*, these priorities are less important, although they still govern states' decisions about which schools to reimburse when appropriations fall short. But there is no reason to think that Congress has retreated from the concern for reaching the poor demonstrated by those priority provisions.

Congress was not coy about its ambitions for the federal breakfast program. It wanted "to meet more effectively the nutritional needs of our children," and "to safeguard the health and well-being of the Nation's children," 42 U.S.C. § 1771, particularly those children who, because of their family's poverty or for some other reason, are inadequately fed. To this end Congress wanted the program to expand and to reach every school where it is needed. In § 21.914 Texas has tried to bring Congress's plan to fruition; it has been faithful to Congress's intentions. We do not agree with GISD that such fidelity is outlawed by the program itself. In this context we cannot accept GISD's pretension to be a rulemaker instead of just a housekeeper, for GISD's claim would take the starch out of the breakfast program.

For all of these reasons, we think that Congress—in addition to trusting the states generally, and not wanting to limit their

control over the breakfast program—particularly favored state efforts to expand the program to reach poorer children. The federal breakfast program, and the policies underlying it, are entirely compatible with Texas's § 21.914. The district court was correct to hold that § 21.914 is constitutional. Its judgment is

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 78-2505

D. C. DOCKET NO. CA 3-78-0238-F

DR. RONNIE ROGERS, ET AL.,
Plaintiffs-Appellants,

versus

DR. M. L. BROCKETTE, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the

NORTHERN DISTRICT OF TEXAS

BEFORE SKELTON,* SENIOR JUDGE AND GOLDBERG AND FAY, CIRCUIT JUDGES.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

---

*Senior Judge, United States Court of Claims, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the plaintiffs-appellants pay to the defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

February 2, 1979

Issued As Mandate:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DR. RONNIE ROGERS, ET AL	)	
vs.	)	No. CA3-78-0238-F
DR. M. L. BROCKETTE,	)	
Commissioner of Education of	)	
the State of Texas, et al	)	

ORDER

Plaintiffs have filed a motion for summary judgment against the Defendants in the above referenced case and the Defendants have responded with a cross motion for summary judgment against the Plaintiffs. The issues have been briefed and an oral argument was held in chambers. The Court is of the opinion that the Defendants' motion for summary judgment should be, and hereby is GRANTED. The Plaintiffs' and Intervenor's motions for summary judgment are DENIED.

This suit involves an attempt by the Garland Independent School District as well as the intervening Greenville Independent School District to invalidate Section 21.914 of the Texas Education Code because of an alleged conflict with 42 U.S.C. §1773 and regulations thereunder. I have granted the Defendants' summary judgment motion on the ground that the Plaintiffs lack standing to initiate or maintain this action.

Even if the Plaintiffs had standing to bring and maintain this action I do not believe that the state statute conflicts with the federal statute. The intent of the Federal School Breakfast

Program is to provide every eligible school child with free breakfast. *Torres v. Butts*, 397 F.Supp. 1015 (N.D. Ill. 1975). The state statute furthers this congressional intent by requiring school districts with a certain percentage of eligible children in one or more schools to participate in the federal program. The Plaintiffs argue that even if the objectives of the state and federal statutes are the same, the state statute may impair the federal supervision of this field and, therefore, should be struck down. However, the Court does not see how, in any way, the federal supervision of this program is impaired by the Texas statute.

The school district may not even suffer any financial damage as a result of participation in this program. The federal statute provides that a school may be entitled to receive 100% of the operating costs of the breakfast program, including the cost of obtaining, preparing and serving food. 42 U.S.C. §1773(d). Thus, even though Plaintiffs allege that there may be significant expenditures required of the Garland and Greenville Independent School Districts, it appears that, pursuant to the federal law, the school districts may be completely reimbursed.

It is so ORDERED.

/s/ ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

June 26, 1978
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DR. RONNIE ROGERS, ET AL	)	
vs.	)	No. CA3-78-0238-F
DR. M. L. BROCKETTE,	)	
Commissioner of Education of	)	
the State of Texas, et al	)	

FINAL JUDGMENT

The Court is of the opinion that the Defendants' motion for summary judgment should be and hereby is granted. The Plaintiffs' motion for summary judgment is denied. The motion for summary judgment of the intervenor Greenville Independent School District is denied. All parties shall bear their own costs.

/s/ ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

June 26, 1978
DATE

RESPONSE REQUESTED

Supreme Court, U.S.
FILED
JUL 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

NO. 78-1616

* * *

DR. RONNIE ROGERS, ET AL.,
Petitioners

VS.

DR. M. L. BROCKETTE, ET AL.,
Respondents

* * *

RESPONDENTS' BRIEF IN OPPOSITION

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-1616

* * *

DR. RONNIE ROGERS, ET AL.,
Petitioners

VS.

DR. M. L. BROCKETTE, ET AL.,
Respondents

* * *

RESPONDENTS' BRIEF IN OPPOSITION

* * *

OPINION BELOW

Petitioner seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit reported at 558 F.2d 1058, a copy of which is attached as Appendix B to the Petition for Writ of Certiorari, which affirmed the Order of the District Court. The District Court did not write an opinion. However, its Order and Judgment are attached to the Petition for Writ of Certiorari as Appendix C.

JURISDICTION

The formal, procedural requisites would appear to be satisfied in this case.

QUESTIONS PRESENTED

1. Whether Section 21.914 of the Texas Education Code, mandating participation in the federal school

breakfast program in certain situations, conflicts with the federal statute creating the school breakfast program.

2. Whether, assuming a conflict between the state and federal statutes, the supremacy clause operates to invalidate the Texas statute.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provision of the United States Constitution is Article 6, Clause 2, the Supremacy Clause.

The federal statutes involved are 42 U.S.C. §1773, et seq.

The State statutes involved are §§21.914 and 23.26 of the Texas Education Code.

The pertinent regulations are 7 C.F.R. Part 220, et seq.

STATEMENT OF THE CASE

The Petitioners, Garland Independent School District, filed suit in the United States District Court for the Northern District of Texas, Dallas Division, seeking to have §21.914 declared invalid pursuant to the Supremacy Clause of the Constitution of the United States. Petitioners contended that the school breakfast program, 42 U.S.C. §1773, et seq. gave them the power to decide whether to participate in said program and that the Texas Statute, §21.914 Texas Education Code, in mandating participation in certain situations, was invalid as conflicting with federal law. On cross-motion for summary judgment, the District Court ruled that Petitioners lacked standing to sue the State of Texas and that there was no conflict between the State and Federal Statutes.

On expedited appeal, the Fifth Circuit Court of Appeals reversed the District Court on the question of the school district's standing to sue the State of Texas. However, the Fifth Circuit affirmed as to the lack of a conflict between the statutes and ruled that the Texas Statute was consistent with the policy statement set out at 42 U.S.C. §1773(g). Said opinion was rendered on February 2, 1979.

Petitioners subsequently filed a Petition for Writ of Certiorari and this brief is in response thereto.

ARGUMENT AND AUTHORITIES

I.

THERE IS NO CONFLICT BETWEEN THE STATE AND FEDERAL STATUTES IN QUESTION.

Petitioners contend that Section 21.914 of the Texas Education Code conflicts with 42 U.S.C. §1773 et seq., and the regulations thereto and is, therefore, invalid pursuant to the Supremacy Clause of the Constitution of the United States. More specifically, Petitioners contend that: participation in the School Breakfast Program is voluntary; Petitioners are the proper entity to decide whether to participate; and Section 21.914, in mandating participation, conflicts with the federal legislation.

Petitioners first claim that 42 U.S.C. §1773(a) grants them the right to decide whether to participate in the program. The statute reads in part:

> There is hereby authorized to be appropriated such sums as are necessary to ... assist the *States* through grants-in-aid and other means to initiate, maintain, or expand nonprofit breakfast programs *in all schools which make application for assistance* and agree to carry

> out a nonprofit breakfast program in accordance with the chapter. (Emphasis added) 42 U.S.C. §1773(a).

However, as opposed to evidencing a Congressional desire to allow the Garland Independent School District to make a decision, this section demonstrates Congress' desire to provide for needy children by assisting the "States".

Other subsections of §1773 also evidence Congress' "state mindedness" in dealing with the problem of needy school children. Subsection (b)(1) speaks of the Secretary apportioning funds among the States. Subsection (c) requires that funds apportioned and paid to any State be disbursed by the State educational agency, Respondents herein, to schools selected by the State educational agency. Subsection (d) requires the State educational agency to establish eligibility standards. Therefore, Congress being "state minded" the state mandate does not conflict the federal statute.

Petitioners also rely on the regulations of the Department of Agriculture for the proposition that they are the proper entity to decide whether to participate. The regulation, 7 C.F.R. §220.7(a) states in part:

> The School Food Authority shall make written application to the state agency ... for any school in which it desires to operate the School Breakfast Program ..."

The "School Food Authority" is defined as "the governing body which is responsible for the administration of one or more schools and which has legal authority to operate a breakfast program therein." 7 C.F.R. §220.2(w). The Garland Independent School District is a creature of the Legislature of the State of Texas which was established pursuant to Title II, Chapter 19 of the Texas Education Code. As such, its

"legal authority" is a matter of state law. *City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923); *City of Newark v. State of New Jersey*, 262 U.S. 192 (1923); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *Dallas Independent School District v. Edgar*, 255 F.2d 455 (5th Cir. 1976). The enactment of §21.914 removed any legal authority Garland Independent School District may have had to decide whether to participate in the program if it has one or more schools with at least ten percent eligible students. There is no state restriction on participation of school districts containing less than ten percent eligible students. Unlike the statute in *County of Los Angeles, California v. Adams*, 574 F.2d 607 (D.C. 1978), there is no specific statutory requirement that a local entity make a decision. Likewise, there is no indication that Congress sought to abrogate the states' power to alter the legal authority of its political subdivisions as a condition for the receipt of federal assistance.

In addition, the regulations, 7 C.F.R. §220.7(c), require tne "State educational agency ... to extend the benefits of the School Breakfast Program to children attending schools in areas where poor economic conditions exist." In mandating participation, if schools have ten percent or more eligible students, the state has decided that poor economic conditions exist in these schools and is fulfilling its obligation to extend the benefits of the program to students in these areas.

The legislative history of the first sentence of §1773(a) supports Respondents position that Congress sought to provide assistance to states in providing for needy children. The earlier version of the first sentence of §1773(a) read:

> There is hereby authorized to be appropriated for each of the fiscal years 1972 and 1973 not to exceed $25,000,000 to carry out a program to assist the *States* through grants-in-aid and

> other means to initiate, maintain, or expand nonprofit breakfast programs in schools. (Emphasis added)

This provision clearly evidences Congressional intent to assist the states in providing breakfast programs for needy children.

Congress, in 1872, decided to provide an open-ended authorization of funds in order to make the benefits of the program available to all needy children. See S. Rep. No. 92-1027, 92nd Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Admin. News, pp. 3380, 3392. In providing the open-ended authorization, Congress did so by rewriting the statute to provide "such sums as are necessary [to fund the program] in all schools which make application ..." However, the statute retained the phrase "to assist the States through grants-in-aid ..."

Other provisions of the Statute and regulations authorize or, at the very least, evidence Congress' hospitality toward statutes such as Section 21.914. The State educational agency is required to: (a) receive applications from local school districts, Section 1773(a); (b) enter into contracts with local schools and school boards to run the breakfast program, 7 C.F.R. Section 220.7(a); set rates of disbursement, 7 C.F.R. Section 220.9; (d) decide which school districts will receive additional payments if the uniform national rates do not cover all costs, Section 1773(d), 7 C.F.R. Section 220.9(a). Under the earlier version of the program, when only limited funds were available, the State selected the schools which would participate in the program and they still choose which schools to reimburse if funds are insufficient to reimburse all schools participating. See 42 U.S.C. §1773(c). The State is also required to submit a plan demonstrating their intention to use the funds provided to the maximum extent practicable to reach needy children, 42 U.S.C. §1759a(e)(1)(C). Entrusting the performance of these functions to the states is, at the

the very least, inconsistent with the theory that Congress sought to insulate the local schools or school boards from State mandates such as Section 21.914.

Petitioners also allege that Section 21.914 seeks to change the requirements of the federal program by only requiring participation in those schools with ten percent or more eligible students. The Statute reads in part:

> If at least ten percent of the students enrolled in one or more schools in a school district are eligible for free or reduced price breakfasts under the National School Breakfast Program provided for by the Child Nutrition Act of 1966 (42 U.S.C. §1773), the governing board of the district shall participate in the program and make the benefits of the program available to all eligible students in said schools.
>
> Section 21.914, Texas Education Code.

This Statute is capable of two interpretations, neither of which would vary the operation of the federal program. One interpretation is that if the school district has at least one school with at least ten percent eligible students, the program must be made available to all students within the district. The other interpretation is that if a school district has one or more schools with at least ten percent eligible students, the program must be made available only to students in those schools. A federal district court has decided that if the program is offered within a school district, it must be offered in all schools which have eligible students. *Torres v. Butz*, 397 F.Supp. 1015 (N.D. Ill. 1975). Consistent with this ruling, state law mandates participation and federal law mandates that said participation be available to all eligible students. Therefore, the Texas Statute does not seek to alter the functioning of the federal program.

II.

ASSUMING A CONFLICT BETWEEN THE STATE AND FEDERAL STATUTES, THE SUPREMACY CLAUSE DOES NOT OPERATE TO INVALIDATE THE STATE STATUTE.

Assuming there is some conflict between the state and federal statutes, the supremacy clause, Article 6 Clause 2, U.S. Con., does not operate to invalidate the Texas Statute. This Court has stated the test for determining the invalidity of a state statute as "whether under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Goldstein v. California*, 412 U.S. 546 (1973). See also, *Florida Lime and Avocado Growers v. Paul* 373 U.S. 132 (1963). The purposes and objectives of Congress are made explicit in 42 U.S.C. §1773(g), which provides:

> as a national nutrition and health policy, it is the purpose and intent of Congress that the school breakfast program be made available in all schools where it is needed to provide adequate nutrition ... .

It cannot be said that the Texas mandate stands as an obstacle to the accomplishment and execution of this Congressional purpose.

Numerous Circuit Courts of Appeals have had occasion to address the question of invalidation of state statutes pursuant to the supremacy clause. The First Circuit in *Doctors Hospital, Inc. v. Silva-Recio*, 558 F.2d 619 (1st Cir. 1977) has stated the test thusly:

> Unless there is a specific prohibition in the federal law, a state law which complements federal law is valid. *Id.*

Petitioners have not cited, nor can they cite, any specific prohibition of the action taken by the legislature of the State of Texas. The Fifth Circuit in *DeKalb County, Georgia v. Henry C. Beck Company*, 382 F.2d 992 (5th Cir. 1967), and cases cited therein, has ruled that the application of the supremacy clause requires a determination of and balancing of, state and local action against federal policy. The state action involved in this case is the mandating of participation in the school breakfast program in certain situations. Section 21.914, Texas Education Code. The federal policy involved is the provision of the benefits of the school breakfast program in all schools where it is needed to provide adequate nutrition. 42 U.S.C. §1773(g). The necessity of this brief indicates that, absent the Texas mandate, the needy school children of the Garland Independent School District would not reap the benefits of the school breakfast program.

CONCLUSION

For the reasons advanced above, the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas B. Owen, Assistant Attorney General of Texas, attorney for Respondents, certify that three copies of the above and foregoing Respondent's Brief in Opposition have been served by placing same in the United States Mail, certified, postage prepaid, addressed to: Messrs. Earl Luna and Thomas B. Murto, III, Luna, Murto and Vorpahl, 2416 LTV Tower, 1525 Elm Street, Dallas, Texas 75201, on this the ___ day of July, 1979.

DOUGLAS B. OWEN